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No.

IN THE

Supreme Court of the United States

MARY ALICE GWYNN, PETITIONER

v.

JAMES F. WALKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the court of appeals nullified the core principles of Chambers v. NASCO, Inc., 501 U.S. 32(1991) and sabotaged the "safe harbor" provisions of the federal rules when it sua sponte relied upon a bankruptcy court's inherent power to justify sanctioning an attorney who had withdrawn the offending motion before sanctions were imposed?

2. Is an attorney against whom sanctions are imposed for filing an allegedly frivolous motion denied due process when she is deprived of the "safe harbor" opportunity provided by bankruptcy and federal rules to withdraw or correct the offending motion before sanctions could be imposed?

3. There is a split of authority among the circuits on the propriety of resorting to a court's inherent power instead of the relevant federal rules and statutes to impose sanctions in the aftermath of an allegedly frivolous filing; does this conflict warrant resolution by this Court which has the responsibility in its superintendency over the federal system to formulate the controlling rules for litigation so that these rules in their reach and result provide all parties with due process?

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The published Memorandum Order of the United States Bankruptcy Court for the Southern District of Florida in In re: James F. Walker, Debtor, Civil Action No. 03-32158-BKC-PGH Chapter 7, filed April 26, 2006, sanctioning the petitioner in the amount of $14,000, is set forth in the Appendix hereto(App.12-69).

The unpublished order of the Court of Appeals for the Eleventh Circuit in Mary Alice Gwynn v. James F. Walker(C.A. No. 07-14049), dated August 28, 2008, denying the petitioner's timely filed petition for rehearing or for rehearing en banc, is set forth in the Appendix hereto(App. 70).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the order of the United States Bankruptcy Court for the Southern District of Florida sanctioning the petitioner in the amount of $14,000 was entered on July 7, 2008; and its further order denying the petitioner's timely filed petition for rehearing or for rehearing en banc, was filed on August 28, 2008(App.1;70).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for rehearing or for rehearing en banc. 28 U.S.C. 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. 1927

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

11 U.S.C. 105

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking

any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

Fed. R. Civ. P. 11(c)

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation....

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial, is

withdrawn or appropriately corrected within 21 days after service or within another time the court sets....

Fed. Bankruptcy Rule 9011:9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) Signing of papers

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless

increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated

(A) By motion

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b).

If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On court's initiative

On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

STATEMENT

In the wake of certain misconduct by Gary J. Rotella, Esq.("Rotella"), the attorney for the respondent debtor James F. Walker ("the respondent" or "Walker"), and his serial motions for sanctions against her, the petitioner Mary Alice Gwynn, Esq.

("the petitioner"), an attorney for one of the two judgment creditors of the respondent, filed on April 5, 2004, the alleged offending motion seeking sanctions against Rotella(App. 2;14;33-34).

On May 28, 2004, six weeks later, without any prior notice of Rotella's intent to seek sanctions against her under Bankruptcy Rule 9011, the petitioner orally withdrew the alleged offending motion with the approval of Rotella and the Bankruptcy Court during a scheduled hearing on various other motions. The oral withdrawal by the petitioner was followed with a confirming court order, drafted by Rotella, one which contained no notice of any reservation of right or jurisdiction for Rotella to seek or for the Bankruptcy Court to impose Rule 9011 sanctions against the petitioner based upon this offending motion(App. 20).

On June 7, 2004, approximately a week later, the petitioner withdrew as counsel for the creditor and a motion for substitution of counsel was filed(App. 14). The motion was granted on June 9, 2004(App. 14). The order by the Bankruptcy Judge granting the substitution of counsel did not reserve jurisdiction to consider any future matter involving the petitioner and she was relieved from the proceeding(App. 14).

On July 7, 2004, after the petitioner was no longer in the case, and without prior notice, Rotella filed a motion seeking Rule 9011 sanctions against the petitioner "for her having filed...on April 5, 2004, [her] motion for sanctions against" Rotella, alleging for the first time, after the petitioner had already withdrawn this offending motion, that it lacked merit and factual support and therefore justified the award Rule 9011

sanctions(App. 19-20).

Despite the entry of the order withdrawing the petitioner's offending motion and even though the petitioner had been released from this case as counsel for one of the creditors, Rotella's motion seeking Rule 9011 sanctions against her for filing this earlier motion was set down for hearing in Bankruptcy Court on April 21, 2005(App. 20). At this hearing, Rotella conceded that he had not sent the required 21-day Safe Harbor communication to the petitioner for this motion; the court thereupon denied Rotella's motion for sanctions "without prejudice to it being re-filed under any other appropriate grounds"(App. 20).

The Bankruptcy Judge then allowed Rotella to re-file his failed Rule 9011 motion for sanctions under 28 U.S.C. 1927, again without any prior notice as the subject motion had been withdrawn without objection by Rotella or reservation by the Bankruptcy Judge some twelve (12) months earlier(App. 21). On July 15, 2005, the Bankruptcy Court denied the petitioner's motion to dismiss Rotella's renewed motion for sanctions under 28 U.S.C. 1927, for lack of jurisdiction and for lack of notice; and on August 29, 2005, after hearing, it issued an order granting sanctions against the petitioner under 28 U.S.C. 1927, and 11 U.S.C. 105(App. 21-22).

On October 7, 2005, the Bankruptcy Court sua sponte issued an amended order vacating its August 29, 2005, order granting the sanctions under 28 U.S.C. 1927, and issued an amended order granting the sanctions but reserving judgment on the amount of the award(App. 22). The amended order found that the

petitioner had been negligent in conducting routine investigations before lodging unfounded and inconsistent allegations against Rotella, an implicit finding that the petitioner had not acted in bad faith or with ill will(A.22). As the Bankruptcy Judge observed, if the petitioner had researched the issue a little better, she would not have filed the pleadings that she did(A.22). He found that her offending motion, long since withdrawn, was vexatious, frivolous and an abuse of process which unreasonably multiplied the proceedings in violation of 28 U.S.C. 1927, and 11 U.S.C. 105(App. 22-23).

On April 26, 2006, the Bankruptcy Court then entered a third order once again awarding Rotella sanctions under 28 U.S.C. 1927(App. 12-69). In that order, the Bankruptcy Court without notice and without taking any additional evidence, sua sponte changed its analysis justifying the sanction from one of negligence/carelessness by the petitioner reflected in its previous orders of August 29, 2005, and October 7, 2005, to a more blameworthy standard of "bad faith"(App. 44-46;48-49). Because she was given no notice that the Bankruptcy Judge was contemplating a new order containing a new rationale for sanctioning her other than the episodic negligence predicates associated with 28 U.S.C. 1927, the petitioner was deprived of an opportunity to refute the Court's new sua sponte finding of her "bad faith." Monetary sanctions in the amount of $14,000 were assessed against her(App. 49-54).

After the District Judge affirmed the sanction employing the same analysis as the Bankruptcy Judge under 28 U.S.C. 1927, the court of appeals affirmed the

sanction award against the petitioner(App. 1-11). However, in making this ruling, the court of appeals founded its decision not on any analysis under 28 U.S.C. 1927, but rather on its determination for the first time in this litigation---that the sanction award was a justifiable use of the Bankruptcy Court's "inherent power to impose sanctions on parties and lawyers"(App. 6-7). In this regard, the court further determined that the petitioner's conduct, i.e., the lack of any evidentiary support for her allegations together with her minimal investigation, now amounted to bad faith conduct invoking the lower court's inherent power(App. 7-8).

Finally, the court of appeals inexplicably overlooked the petitioner's clear challenge in her appellate argument to the procedural unfairness of determining her bad faith conduct in the absence of any hearing or opportunity to refute that elevated finding of bad faith and to conclude without further analysis that "Gwynn does not contend that she did not receive due process in the imposition of sanctions"(App. 7).

In the wake of this decision, the petitioner Gwynn petitioned the court of appeals for a rehearing or for a rehearing en banc of her claims. She argued that the court of appeals failed to address her appellate argument that the Bankruptcy Judge erred by imposing sanctions under 28 U.S.C. 1927; that the court of appeals erroneously ignored her appellate argument that the procedural scenario below denied her due process; and that its surprising and unanticipated reliance on the lower court's "inherent power" to justify the sanction "is in conflict with all Circuit Court cases the panel relies upon and adopted in support of its denial of sanctions under Rule 11."

On August 28, 2008, the court of appeals denied the petitioners' petition for rehearing or for rehearing en banc(App. 70). The petitioner now petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE PETITION

1. By Sua Sponte Affirming the Sanction Imposed Below By Resort To The Bankruptcy Court's Inherent Power Instead of Under 28 U.S.C. 1927, the Court of Appeals Nullified The Core Principles of Chambers v. NASCO, Inc., 501 U.S. 32(1991) And Sabotaged the Safe Harbor Provisions of Fed. R. Civ. P. 11.

In Chambers v. NASCO, Inc., 501 U.S. 32, 35(1991), this Court granted certiorari to "explore the scope of the inherent power of a federal court to sanction a litigant for bad-faith conduct."Id. Specifically, this Court addressed the question of whether the inherent power of the lower federal courts had been displaced through the promulgation of Fed. R. Civ. P. 11 and the enactment of 28 U.S.C. 1927. The lower courts had determined that the exercise of a court's inherent power was proper "when the party's conduct is not within the reach of the rule or the statute" Id. at 42.

In affirming the lower courts' continued recognition of the inherent power doctrine, the Chambers Court explained:

> [t]here is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion

> that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct.
>
> This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, see Roadway Express, Inc. v. Piper, [447 U.S. 752, 767(1980)]. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50(emphasis supplied).

The misconduct by the litigant in Chambers was pervasive and encompassed different types of activities that for various reasons could not be sanctioned by either Rule 11 or 1927. However, when the misconduct at issue is of the type that is covered in its entirety by the rules or by the statute, should a court be permitted to ignore the requirements of the rule and instead invoke its inherent power? In other contexts, this

Court has explicitly prohibited an exercise of a court's inherent power if that power violated the intent of an otherwise applicable rule or statute. See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 254(1988) (holding supervisory power may not circumvent mandatory language of harmless-error inquiry required by Fed. R. Crim. P. 52(a)); Carlisle v. United States, 517 U.S. 416, 428; 430(1996)(explaining that "inherent authority" to grant a motion for judgment of acquittal when motion was untimely under applicable rule was improper exercise of inherent authority); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35(1998)(ruling that mandatory language of a procedural rule is "impervious to judicial discretion").

The amorphous guidelines set forth in Chambers, i.e., the court's inherent power is proper when the rules are "not up for the task" or that "the inherent powers must continue to exist to fill in the interstices," id. at 46, unfortunately have resulted in an improper of expansion of resort by federal courts to their inherent powers to sanction parties or their attorneys. Since Chambers, the circuit courts of appeals have developed starkly different standards regarding the circumstances which should prompt a court to exercise its inherent power to sanction litigants when there exists otherwise applicable statutes or rules for those sanctions. This Court should grant certiorari to define the proper contours of the use of these inherent powers, the dimensions of which were left open by Chambers's indefinite guidelines, uncertain standards which have resulted in the circuit conflict detailed below. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393(1923); Rice v. Sioux City Cemetery, 349 U.S. 70, 79(1955).

The material facts are not in dispute. During bankruptcy proceedings, the petitioner filed a motion for sanctions against opposing counsel. A hearing was set on numerous other matters between the petitioner and the respondent, including the sanction motion. On the morning of the hearing, the petitioner on her own initiative withdrew the motion for sanctions without objection. Several weeks later, for health reasons, the petitioner withdrew from the case, again without objection and without any conditions imposed by the court. The respondent thereafter filed a motion for Rule 11 sanctions based solely on a challenge to the previously agreed upon withdrawn motion for sanctions. Ultimately, the respondent's unnoticed Rule 11 sanction motion was denied because the respondent had not complied with Rule 11's Safe Harbor provisions.

However, the Bankruptcy Court invited the respondent to seek sanctions under any other authority he so chose. The respondent complied and the Bankruptcy Court ultimately imposed sanctions on the petitioner pursuant to both 28 U.S.C. 1927 and 11 U.S.C. 105. In doing so, the court, without conducting any further hearing or relying upon any different facts, altered its original finding of negligence and found now that the petitioner had acted in bad faith. On appeal from the district judge's affirmance of this sanction, the petitioner argued that the district court had erred in imposing sanctions upon her under 28 U.S.C. 1927, and in substituting a finding of bad faith for a finding of negligence without providing her a hearing on this crucial issue. The court of appeals affirmed the sanction award by side-stepping altogether the issue of whether 1927 was satisfied on this record and by sua sponte

ruling that "[f]ederal courts, including bankruptcy courts, have the inherent power to impose sanctions on parties and lawyers"(App. 7).

By affirming the actions of the Bankruptcy Court by resort to its inherent power to impose sanctions on those who appear before it when there are federal statues and rules which rightly apply in the circumstances, the court of appeals has improperly expanded a federal court's inherent powers to sanction beyond the dimensions described by this Court in Chambers. Indeed, the result below nullifies the core principles of Chambers , is at odds with this Court's other decisions in Bank of Nova Scotia, Carlisle, and Lexecon Inc., and sabotages the Safe Harbor provisions of Rule 11, a prophylactic device insuring fairness which allows litigants and attorneys the opportunity to avoid sanctions by withdrawing the offending pleading/motion before the hearing on sanctions is held.

The 17-year policy established by Chambers is that resort to a court's inherent powers to justify sanctions should be used sparingly, only when the conduct sought to be sanctioned is not covered by any statute or rule, e.g., 1927 or Rule 11, or only when the presumptively applicable statute or rule is "not up to the task" to address the offending conduct.

The conduct raised by this petition is clearly distinguishable from the conduct addressed in Chambers, conduct which was otherwise punishable under Rule 11. This Court in Chambers agreed with the Fifth Circuit Court of Appeals that the federal district court acted appropriately when it invoked its inherent power to sanction bad-faith conduct, behavior

which was so egregious that it went beyond the rules and statutory schemes available to the district court. This Court held that by utilizing the discretion to invoke its inherent power to sanction Chambers, the district court acted in an acceptable manner " in light of the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure such abuses were not repeated," and further held that in utilizing its inherent power in order to punish Chambers' severe conduct, the district court did not "thwart the mandatory terms of Rule 11 ." 501 U.S. at 50.

In contrast, in the instant case, none of the offending conduct by the petitioner rose to a level which would warrant a bad-faith finding, certainly not to a level which would invoke the Court's inherent power under the calculus in Chambers. There the offending litigant was sanctioned " for the fraud he perpetuated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of litigation," id. at 54; and he had received ample notice that his conduct was sanctionable. The petitioner here, on the other hand, with the respondent's agreement, voluntarily withdrew the offending motion before the Bankruptcy Court. None of these facts here reasonably comes within Chambers and the court of appeals was wrong to resort to the lower court's inherent powers to justify the sanction of $14,000 levied against the petitioner.

By wrongly invoking the lower court's inherent power for the first time at the appellate level as a "fail safe" when the offending conduct was clearly covered under the federal rules and statutes law which would

have prevented the sanctions from being imposed because the petitioner was not provided with the Safe Harbor opportunity provided by this law the court of appeals has expanded Chambers beyond its reasonable contours, sabotaged the Safe Harbor provisions of the federal rules and undermined Chambers' 17-year policy that resort to a court's inherent powers to justify sanctions should be used sparingly, only when the conduct sought to be sanctioned is not covered by any statute or rule, e.g., 1927 or Rule 11, or only when the presumptively applicable statute or rule is "not up to the task" to address the offending conduct. Such was not the case here and the decision below violates these core principles of Chambers.

2. There is a Split of Authority Among the Circuits About When It Proper For a Federal Court to Resort To Its Inherent Powers In Order to Sanction A Party or An Attorney For Filing An Allegedly Frivolous Motion When Such Conduct Is Adequately Covered Under the Federal Rules.

The Seventh Circuit Court of Appeals in Corely v. Rosewood Care Center 142 F.3d 1041 (7th Cir. 1998), held that a lower court could not exercise is inherent power as a substitute for Rule 11 sanctions when a party failed to comply with the safe-harbor provisions of Rule 11. Id. at 1058.. The Corely Court interpreting Chambers and its previous case law explicitly found:

> Both this court and the Supreme Court have emphasized, moreover, that the inherent power must be invoked with the utmost caution, particularly where the matter under consideration "is governed by other procedural

> rules, lest . . . the restrictions in those rules become meaningless." Kovilic Constr. Co. v. Missbrenner, 106 F.3d 768, 772-73 (7th Cir. 1997); see also Chambers, 501 U.S. at 44 & 50. That is a significant consideration here because defendants' suggestion that the sanction was an appropriate exercise of the court's inherent power, even if a technical violation of the procedural requirements of Rule 11, would have the effect of rendering Rule 11's separate motion and safe harbor provisions meaningless. As we have indicated in the past, "'where the rules directly mandate a specific procedure to the exclusion of others, inherent authority is proscribed.'" G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (quoting Landau & Cleary, Ltd. v. Hribar Trucking, Inc., 867 F.2d 996, 1002 (7th Cir. 1989)). Id. at 1059(emphasis added).

Both the Federal Circuit and the Third Circuit agree with Corely that a federal court should resort to its inherent power to sanction a party or attorney only sparingly and only when an otherwise applicable statute or rule is clearly not up to the task. See, e.g., see Amsted Industries, Inc. Buckeye Steel Castings Co. 23 F.3d 374 (Fed. Cir. 1994)(finding that courts abuse their discretion when they exercise their inherent power to sanction conduct that is covered by the rules); Montrose v. Med. Group Participating Sav. Plan v. Bulger , 243 F.3d 773(3rd Cir. 2001)(requiring courts to first apply rules of civil procedure prior to exercising inherent powers).

However, in First Bank of Marietta v. Hartford Underwriters Insurance, 307 F.3d 501, 510-511;515 n.12(6th Cir. 2002), the Sixth Circuit upheld the imposition of sanctions by resort to a court's inherent power even though there were applicable statutes and rules which could address the situation, basically eliminating the "up to the task " requirement of Chambers. Similarly, in United States v. Seltzer, 227 F.3d 36, 39(2nd Cir. 1999), the Second Circuit indicated that it too has an expansive reading of a court's inherent power to sanction beyond the limits set out in Chambers. Id. Both the Fifth Circuit and the Ninth Circuit agree that a lower court may resort to its inherent power to deal with episodic misbehavior falling short of bad faith even though there are states and federal rules available to address the problem. See, e.g., Carroll v. The Jaques Admiralty Law Firm, 110 F.3d 290(5th Cir. 1997); Fink v. Gomez, 239 F.3d 989,994(9th Cir. 2000); Mark Industries Ltd., v. Sea Captain's Choice, Inc., 50 F.3d 730, 732-733(9th Cir.1995).

This conflict among the circuits demonstrates that while this Court has explicitly precluded the exercise of a court's inherent power where other statutes and rules may address the situation, confusion and conflict exists. As explicitly found by the Seventh Circuit in Corely, a court's inherent powers cannot be used to circumvent the well established Safe Harbor provision of Rule 11. That would obviously and certainly eviscerate the intent of the Rule which explicitly addresses the misconduct of filing improper pleadings. This case presents the opportunity for this Court to address the obvious conflict among the circuits and this Court's precedent regarding the dimensions of

a court's inherent power that has been left open by Chambers.

Moreover, this inter-circuit conflict undermines the core principles of Chambers. The due process values which have prompted the Safe Harbor provisions of Rule 11 can easily be avoided by resort to a court's "inherent power" to mete out sanctions to parties or their attorneys. This unrestrained power to sanction also produces a "chilling effect" on the zealousness with which parties will bring controversial cases in the federal court. The growing tendency of some circuits to ignore Rule 11's Safe Harbor provisions and other relevant statutes in fashioning sanctions continues to undermine Chambers' core values and has led to a loss of procedural due process when sanctions are imposed.

3. The Procedure Below Sanctioning The Petitioner Violates Due Process.

The petitioner was denied procedural due process in three principal ways below:

1. She was denied the benefits of the Safe Harbor provisions of the federal rules when even though she had withdrawn the offending motion in a timely manner, she was still subjected without notice to sanctions for the same conduct even after having been allowed to withdraw from the bankruptcy proceeding altogether;

2. She was denied notice of, a hearing on and the right to argue against the finding of the Bankruptcy Judge that her negligent conduct had now been

transformed into bad faith which could be punished without a hearing and regardless of the Safe Harbor protections; and

3. She was denied the right to brief and argue before the court of appeals the question of whether the sanctions below could be justified on the basis of the lower court's inherent power. The court of appeals' unanticipated sua sponte resort to the lower court's inherent power to justify the sanction was never addressed, never raised by the parties and never briefed.

With regard to the first two asserted violations of due process, there can be no doubt that the Safe Harbor provisions of Rule 11 import into federal motion practice the notion of fundamental fairness, i.e., that a party or litigant should not be sanctioned if, upon reflection, she timely withdraws the offending motion before the sanctions hearing. To deny the petitioner this opportunity or to deprive her of the benefits which the Safe Harbor provisions make available to any litigant without notice and without a hearing is a denial of due process.

Employing the calculus of this Court's decision in Mathews v. Eldridge, 424 U.S. 319, 334-335(1976) to the circumstances of this case in order to balance the petitioner's legitimate private interest not to be sanctioned with monetary fines unfairly or to have her livelihood threatened with disciplinary action against the judicial system's need for efficient administration, the petitioner submits that the process due her below consisted of the following elements:

A. Adequate Notice. The petitioner was entitled to notice of the hearing on sanctions in the Bankruptcy Court which was reasonably calculated, under all the circumstances, to apprise her of the precise nature of this proceeding. Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314(1950). The notice was required to be of a kind which would reasonably and fairly convey to her the required information so that she could appear and respond effectively with her objections in whatever form was allowed. Id. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1,13-14(1978).This was not provided for either the resuscitated sanction hearing or the Bankruptcy Judge's sua sponte finding made without any hearing at all or the taking of any evidence--- that the petitioner's conduct now amounted bad faith, not just episodic negligence.

B. A Full Evidentiary Hearing On Contested Fact Issues. There were fundamental fact questions to be determined by the Bankruptcy Judge before he could impose sanctions irrespective of the federal rules, e.g., did the petitioner's negligent failure to investigate her claims now amount to bad faith or ill will; or was the offending motion rather brought "unreasonably" or "vexatiously" and did the petitioner's conduct in this regard unduly "multiply the proceedings" within the meaning of 28 U.S.C. 1927? These questions invoked the adequacy of the factual investigation undertaken by the petitioner before she filed her offending motion for sanctions and a hearing addressing these contested fact questions bad faith or negligence?---- was required as a matter of due process before sanctions could be imposed on this record.

Moreover, considering the level of financial deprivation which would flow from the Bankruptcy Court's decision on sanctions and the low tolerance for the risk of a mistaken decision, see Morrissey v. Brewer, 408 U.S. 471, 485-489(1972), these fact questions could not be resolved by just oral argument or by requiring that the parties submit their respective positions "on the papers." Instead, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254,269-270(1970) citing ICC v. Louisville & N. R. Co., 227 U.S. 88,93-94(1913) and Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-104 (1963). The right to cross-examine and confront adverse witnesses and their evidence implies the right to marshal and adduce one's own evidence in support of a position on a contested fact issue such as whether the petitioner investigated her claims sufficiently before bringing her motion; whether she brought this motion in bad faith or unreasonably and vexatiously; whether she multiplied the proceedings; and whether there was an adequate explanation for the conduct deemed deficient.

Especially where the contested facts were subject to different interpretations by the parties and where the resulting decision would result in dramatic monetary penalties as well as possible exposure to professional discipline for the petitioner, she was entitled to a full evidentiary hearing so that the Bankruptcy Court would have a fair and complete record upon which to make its findings on each crucial fact issue while at the same time giving an appellate court a sufficient record upon which to review the

hearing judge's fact finding. See Goldberg v. Kelly, supra. Any doubt by the Bankruptcy Judge on this score should be resolved in favor of taking evidence. In this process, the parties' respective burdens of proof would be a preponderance of the evidence. Addington v. Texas, 441 U.S. 418, 423(1979). See also Hamdi v. Rumsfeld, 542 U.S. at 534.

C. A Fair And Impartial Tribunal. Due process requires a neutral and detached judge in the first instance. Hamdi v. Rumsfeld, 542 U.S. 507,533 (2004) quoting Ward v. Monroeville, 409 U.S. 57, 61-62(1972). Withrow v. Larkin, 421 U.S. 35, 46-47(1975). Goldberg v. Kelly, 397 U.S. at 271. In re Murchison, 349 U.S. 133, 136(1955). While the Bankruptcy Judge is more than a mere umpire----in fact, he is the governor of the proceedings before him he cannot become an advocate or otherwise use his judicial powers to advantage or disadvantage a party unfairly. Quercia v. United States, 289 U.S. 466, 470(1933). Nor "should [he] give vent to personal spleen or respond to a personal grievance." Offutt v. United States, 348 U.S. 11, 14(1954). See 28 U.S.C. Sections 455(a) and (b)(1).

The procedure below denied the petitioner all of these due process rights. She was sanctioned even though she had withdrawn the offending motion under the Safe Harbor provisions and long after she had withdrawn from these bankruptcy proceedings. She was sanctioned after a finding of bad faith, a finding made by the Bankruptcy Judge which recast her negligence to ill will after holding no hearing and taking no evidence. Moreover, she was sanctioned by a tribunal which had lost its ability to deliberate dispassionately about the issues before him. All of this

denied her due process.

As for the third asserted violation of due process, the court of appeals' sua sponte election to found its affirmance on the lower court's inherent power, a question never briefed or argued by the parties, the federal guaranty of due process, extends to the judicial branch of government and the way it decides a litigant's claims. Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1930). With any matter before it, this Court's

> present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, whether [they have] had an opportunity to present [their] case and be heard in its support... Whether acting through its judiciary or through its legislature, a [government] may not deprive a person of all existing remedies for the enforcement of a right...unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 681-682(Brandeis, J.)(footnotes omitted).

Thus where a state appellate court has interpreted its own State statute in a way that was unforeseen, "unexpected," or "indefensible by reference to the law which had been expressed prior to the conduct in issue," in order to deny the litigant an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights regardless of whether he has timely or properly raised this federal issue below. See, e.g., Bush v. Gore, 531 U.S. 98, 115(2000)(Rehnquist, C.J., concurring)(State

court's interpretation of its own election laws impermissibly distorted them beyond what a fair reading required); Wright v. Georgia, 373 U.S. 284, 289-291(1963)(breach of peace statute newly construed; violation of due process); N.A.A.C.P. v. Alabama, 357 U.S. 449, 457-458(1958)(state court's unexpected resort to new procedural rules at odds with prior practice to deny relief to alleged contemnors is a violation of due process). See also United States v. Lanier, 520 U.S. 259, 266 (1997) (due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope); Marks v. United States, 430 U.S. 188, 191-192(1977)(due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties).

Such is the case here. In sustaining the sanction imposed upon the petitioner below, the court of appeals has adopted an unforeseen and unexpected reading of the Chambers' rationale about the limited inherent right of courts to sanction an attorney when other statutes and rules apply---in fact, it has repealed that rationale entirely----so that the petitioner's good faith argument on appeal regarding 28 U.S.C. 1927 is completely disregarded. This unfair, unannounced and wrong reading of the Bankruptcy Court's power to sanction the petitioner never argued and never briefed on appeal----is "indefensible by reference to the law which had been expressed prior to the conduct in issue,"Bouie v. City of Columbia, 378 U.S. 347, 354(1964); and it is so far beyond a "fair reading" of Chambers as to constitute a denial of due process. Id. at 354-355.

While a government may set the terms on which it will permit litigation in its courts, Cohen v. Beneficial Loan Corp., 337 U.S. 541, 552(1949), it may not close its court house doors to litigants by denying them the opportunity to be heard on claims which this Court has already made clear are available to them upon proper proof. The court of appeals' repudiation of the principles enunciated by this Court in Chambers denies the petitioner due process and a fair hearing on her appellate claims.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit and, ultimately, to vacate the judgment sanctioning the petitioner; or to remand the matter to the District Court for a renewed evidentiary hearing consistent with due process before that court or another judge of the Bankruptcy Court on the respondent's motion for sanctions; or to provide the petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,
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Counsel of Record

(any footnotes trail end of each document)
No. 07-14049 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: JAMES F. WALKER, Debtor.
MARY ALICE GWYNN, Plaintiff-Appellant Cross-Appellee,
versus
JAMES F. WALKER, Defendant-Appellee Cross-Appellant.

July 7, 2008, Decided
July 7, 2008, Filed

Appeals from the United States District Court for the Southern District of Florida. D. C. Docket No. 07-80121-CV-ASG. BKCY No. 03-32158-BKC-PGH.

JUDGES: Before DUBINA, BLACK and PRYOR, Circuit Judges.

OPINION

PER CURIAM:

Mary Alice Gwynn, counsel for a creditor in a bankruptcy proceeding, appeals pro se an award of sanctions against her, a denial of her motion for fees under Bankruptcy Rule 9011, and a denial of her motion for recusal. James F. Walker cross-appeals a separate order that vacated an award of sanctions against Gwynn. We affirm.

I. BACKGROUND

Most of the issues on appeal involve two motions for sanctions. Gary Rotella, counsel for Walker, filed both motions in response to motions filed by Gwynn that alleged misconduct by Rotella. In each instance, Rotella was not found to have engaged in misconduct.

Rotella filed the first motion after Gwynn filed a motion to disqualify Rotella as counsel for Walker. Rotella responded to the motion and moved to shorten the notice period for filing a motion for sanctions under Rule 9011. Rotella notified Gwynn that he would seek sanctions under Rule 9011 if she did not withdraw the motion to disqualify. After a hearing, the bankruptcy court denied both the motion to disqualify and the motion to shorten the notice period. Gwynn then filed a renewed motion to disqualify Rotella from representing Walker. That same day, Rotella filed a motion for sanctions against Gwynn under Rule 9011. Ten days later, the bankruptcy court denied the renewed motion to disqualify and granted the motion for sanctions.

Gwynn appealed the award of sanctions to the district court. The district court vacated the award of sanctions because Gwynn had not been afforded twenty-one days to withdraw her motion. Gwynn then filed a motion for attorney's fees and costs as the prevailing party under Rule 9011 and Bankruptcy Local Rule 8014-1. The bankruptcy court granted in part and denied in part the motion and taxed costs in the amount of $ 1,591.58 against Rotella, his law firm, and Walker.

Rotella filed the second motion in response to another motion filed by Gwynn. Gwynn had alleged that Rotella made false representations to the court, committed fraud against the court, and planned to benefit

personally at the expense of the creditors. The bankruptcy court granted Rotella's motion for sanctions and ordered Gwynn to pay Rotella $ 14,000.

II. STANDARDS OF REVIEW

We review the imposition of sanctions for abuse of discretion. *In re Mroz*, 65 F.3d 1567, 1571-72 (11th Cir. 1995). Under this standard, we "must affirm unless [we find] that the [lower] court has made a clear error of judgment, or has applied the wrong legal standard." *Amlong & Amlong, P.A. v. Denny's Inc.*, 500 F.3d 1230, 1238 (11th Cir. 2007). We may affirm on any legal ground supported by the record. *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). We also review a denial of a motion for recusal for abuse of discretion. *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000).

III. DISCUSSION

Our discussion is divided in four parts. First, we address Walker's argument that the district court should not have vacated the first sanction against Gwynn. Second, we address Gwynn's argument that the bankruptcy court abused its discretion in denying her request for fees and costs related to Gwynn's appeal of the first sanction and the denial of some of the expenses for which Gwynn sought reimbursement. Third, we address Gwynn's argument that the bankruptcy court abused its discretion in awarding a sanction of $ 14,000. Fourth, we address Gwynn's argument that the bankruptcy court erred when it denied Gwynn's motion for recusal.

A. The District Court Did Not Err When It Vacated the First Sanction Against Gwynn.

A party who moves for sanctions under Bankruptcy Rule 9011 must follow a two-step process. See Fed. R. Bankr. P. 9011(c)(1)(A). The party first must serve the motion on the opposing party and then, at least twenty-one days later, file the motion with the court. Id. This process provides a "safe harbor" in which the offending party can avoid sanctions by withdrawing or correcting the challenged document or position after receiving notice of the alleged violation.

Although this Circuit has never addressed whether a motion for sanctions under Rule 9011 may be filed after a court has ruled on the offending motion, the Second, Fourth, and Sixth Circuits have concluded that a motion under Federal Rule of Civil Procedure 11, which is "substantially identical" to Rule 9011, *Mroz*, 65 F.3d at 1572, cannot be filed "[i]f the court disposes of the offending contention before the twenty-one day 'safe harbor' period expires." *Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997); see also *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389-90 (4th Cir. 2004) (en banc); *In re Pennie & Edmonds LLP*, 323 F.3d 86, 89 & nn.1-2 (2d Cir. 2003). As the Sixth Circuit explained, "any other interpretation would defeat the rule's explicit requirements." *Ridder*, 109 F.3d at 295. Under that interpretation of Rule 9011, Walker's argument on cross-appeal fails.

There is no doubt that Rotella's motion for sanctions was filed after the offending motion had been denied. Gwynn filed the offending motion to disqualify Rotella

on April 21, 2004. Rotella gave notice that he would seek sanctions on April 24, 2004, but the bankruptcy court denied the motion to disqualify on April 28, 2004. On May 18, 2004, Gwynn filed a renewed motion to disqualify Rotella's law firm, and that same day Rotella filed a motion for sanctions under Rule 9011. Rotella's motion related to the first motion to disqualify filed by Gwynn. Although Rotella's motion for sanctions was filed more than twenty-one days after he gave notice that he would seek sanctions, the bankruptcy court had already denied Gwynn's first motion to disqualify.

We agree with the Second, Fourth, and Sixth Circuits that the service and filing of a motion for sanctions "must occur prior to final judgment or judicial rejection of the offending" motion. *Id.* at 297. Any argument to the contrary renders the safe harbor provision a mere formality. The provision cannot have any effect if the court has already denied the motion; it is too late for the offending party to withdraw the challenged contention. See id. The district court did not err when it vacated the award of sanctions.

B. The Bankruptcy Court Did Not Abuse Its Discretion in Its Denial of Fees, Costs, and Expenses for Gwynn.

Gwynn argues that the bankruptcy court abused its discretion when it did not award her attorney's fees and costs relating to her appeal of the award of sanctions. Gwynn also argues that the bankruptcy court abused its discretion when it did not award all of her reasonable expenses under Bankruptcy Rule 8014. We disagree.

Rotella's motion for sanctions and Gwynn's corresponding expenses could have been avoided if Gwynn had not filed her frivolous motion to disqualify Rotella in the first instance. One of the purposes of sanctions under Rule 9011 is to deter baseless filings, and courts should reduce an award of sanctions based on "the extent to which the nonviolating party's expenses could have been avoided, or mitigated." *Baker v. Alderman*, 158 F.3d 516, 528 (11th Cir. 1998). Because Gwynn's initial frivolous filing prompted the dispute, the bankruptcy court did not abuse its discretion when it denied attorney's fees and costs under Rule 9011(c)(1)(A).

The bankruptcy court also did not abuse its discretion in its award of reasonable expenses under Rule 8014. The denial of fees for a consulting attorney and expert witness, expediting costs, and certain transcript costs was within the discretion of the court under Rule 8014. The bankruptcy court provided detailed reasons for excluding certain expenses, and Gwynn does not provide any legal support for a contrary decision.

C. The Bankruptcy Court Did Not Abuse Its Discretion When It Imposed a Sanction of $ 14, 000 against Gwynn.

Gwynn argues that the bankruptcy court abused its discretion in the imposition of sanctions in the amount of $ 14,000. The bankruptcy court found that sanctions were appropriate under two statutes, 28 U.S.C. §§ 105, 1927, and its inherent authority to manage its affairs. We need not decide whether the bankruptcy court had the authority to impose sanctions under either section 1927 or section 105 because the court did not abuse its

discretion when it awarded sanctions under its inherent powers.

Federal courts, including bankruptcy courts, have the inherent power to impose sanctions on parties and lawyers. *Byrne v. Nezhat*, 261 F.3d 1075, 1121 (11th Cir. 2001); see also Mroz, 65 F.3d at 1572. To impose sanctions under these inherent powers, the court first must find bad faith. *Mroz*, 65 F.3d at 1575. "A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *Byrne*, 261 F.3d at 1121 (citations omitted). Sanctions are "especially appropriate where counsel takes frivolous legal positions supported by scandalous accusations." *Amlong & Amlong*, P.A., 500 F.3d at 1238. The court must afford the sanctioned party due process both in determining that the requisite bad faith exists and in assessing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49, 111 S. Ct. 2123, 2135, 115 L. Ed. 2d 27 (1991).

Gwynn does not contend that she did not receive due process in the imposition of sanctions; she instead argues that the filing of the motion did not amount to bad faith. She also contends that a single motion cannot demonstrate bad faith, but requires multiple instances of misconduct. We disagree.

The bankruptcy court did not abuse its discretion when it imposed a sanction for Gwynn's filing of a motion in bad faith. Gwynn's motion alleged that Rotella had made false representations to the court, committed

fraud against the court, and planned to benefit personally at the expense of the creditors. Gwenn's accusations required multiple hearings and led to a counter-motion for sanctions. The seriousness of the allegations combined with the lack of any evidentiary support or minimal investigation support a finding of bad faith.

Gwynn also argues that the record does not support the amount of the sanction. Gwynn argues that the court should not have considered the expenses incurred after she withdrew her motion, and she contends that the estimates made by the court were arbitrary. We disagree.

The court had an ample evidentiary basis for determining the amount of sanctions. Rotella submitted a detailed log of time spent in response to the motion, and the court examined the log, noted entries that were unnecessary or unwarranted, and found the hourly rate to be reasonable. The court also found that Rotella's response to the motion was disproportionate and estimated the amount of time required for a proportional response.

The court did not clearly err when it included Rotella's time spent after Gwynn withdrew her motion for sanctions. See *In re Optical Techs., Inc.*, 425 F.3d 1294, 1300 (11th Cir. 2005). It was reasonable for Rotella to file the motion for sanctions because Gwynn's motion contained serious and unfounded allegations of misconduct. The court, in response, had to investigate the foundations of Gwynn's motion.

The estimate by the court as to the time necessary to prepare for and attend the hearing on Gwynn's motion, prepare Rotella's own motion, and prepare for and attend the hearing for Rotella's motion was not arbitrary. Based on Rotella's time entries, the experience of the bankruptcy court with fee applications, and its knowledge of Rotella's experience as an attorney, it was not clearly erroneous for the court to determine that forty hours was a reasonable amount of time to respond to the motion for sanctions. The court exercised restraint in its determination of the appropriate amount when it considered Rotella's disproportionate response and considered only a reasonable amount of time to respond to the unfounded motion. The bankruptcy court did not abuse its discretion when it awarded $ 14,000 in sanctions against Gwynn under its inherent powers.

D. The Bankruptcy Court Did Not Abuse Its Discretion When It Denied Gwynn 's Motion for Recusal.

A judge shall recuse himself if he is personally biased or prejudiced against a party or in favor of an adverse party, or whenever the judge's "impartiality might reasonably be questioned." 28 U.S.C. §§ 144, 455(a). The standard is "whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality." *Christo,* 223 F.3d at 1333. "The general rule is that bias sufficient to disqualify a judge must stem from extrajudicial sources." *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1329 (11th Cir. 2002). "The exception to this rule is 'when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party.' Mere 'friction between the court and

counsel,' however, is not enough to demonstrate 'pervasive bias.'" *Id.* (citation omitted) (quoting *Hamm v. Bd. of Regents*, 708 F.2d 647, 651 (11th Cir. 1983)).

Gwynn contends that she established pervasive bias throughout the court proceeding by the bankruptcy judge, but the grounds cited by Gwynn do not include any extrajudicial sources. Gwynn relies on seven orders, all prepared by Rotella, as evidence of bias, and Gwynn contends that she was not able to respond in time to those orders. Gwynn also relies on adverse rulings and her referral to the Florida Bar by the bankruptcy judge.

Although we have "repeatedly condemned the ghostwriting of judicial orders by litigants," *In re Colony Square Co.*, 819 F.2d 272, 274, 277 (11th Cir. 1987), "such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair," *id.* at 276. Whether the opposing party had "ample opportunity to present its arguments," whether the ruling was "correct as a matter of law," and the frequency of the use of orders prepared by a party are relevant factors to consider. See *id.* at 276-77; *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 & 1374 (11th Cir. 1997).

In the light of the extensive history of this litigation, the seven isolated orders, prepared by Rotella, in a bankruptcy proceeding involving almost 2,000 filings do not evince pervasive bias and prejudice. Gwynn had ample opportunity to be heard. She filed responses, motions to strike, notices of hearings, and motions for reconsideration. Although one order was incorrect as a matter of law, it was reversed by the district court, and

the bankruptcy judge admitted his mistaken reliance on a prepared order. None of the other orders was incorrect as a matter of law.

Adverse rulings are grounds for appeal, but rarely are grounds for recusal, see *Liteky v. United States*, 510 U.S. 540, 554, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994), and referral to a state bar disciplinary board for investigation is not considered a sanction or disciplinary measure, see *United States v. McCorkle*, 321 F.3d 1292, 1298 (11th Cir. 2003). Because a fully informed and objective observer would not entertain significant doubt about the bankruptcy judge's impartiality in the proceedings, see *Christo*, 223 F.3d at 1333, we conclude that the bankruptcy judge did not abuse his discretion in denying the motion for recusal.

III. CONCLUSION

The district court did not err when it vacated the first sanction against Gwynn, and the bankruptcy court did not abuse its discretion in its denial of Gwenn's motion for fees, costs and expenses, its sanction of $ 14,000 against Gwynn, and its denial of Gwynn's motion for recusal.

AFFIRMED.

Filed 4/26/06
CASE NO: 03-32158-BKC-PGH Chapter 7
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

IN RE: JAMES F. WALKER, Debtor.

MEMORANDUM ORDER 1)DENYING AS TO MARY ALICE GWYNN, DEBTOR'S AMENDED MOTION FOR ATTORNEY'S FEES AND COSTS AGAINST ELEANOR C. COLE AND MARY ALICE GWYNN [C.P. 838]; 2)VACATING AMENDED ORDER GRANTING MOTION FOR SANCTIONS AGAINST MARY ALICE GWYNN, ESQUIRE PURSUANT TO 28 U.S.C. §1927 AND 11 U.S.C. §105 RELATING TO CREDITOR-ELEANOR C. COLE'S MOTION FOR SANCTIONS AGAINST GARY J. ROTELLA, ESQUIRE PURSUANT TO THE COURT'S ORDER OF JULY 17, 2003 (C.P. 1217]: 3)GRANTING GARY J,. ROTELLA. ESQUIRE'S MOTION FOR SANCTIONS AGAINST MARY ALICE GWYNN ESQUIRE PURSUANT TO 28 U.S.C. §1927 AND 11 U.S.C. §105 RELATING TO CREDITOR, ELEANOR C. COLE'S MOTION FOR SANCTIONS AGAINST GARY J. ROTELLA, ESQUIRE PURSUANT TO THE COURT'S ORDER OF JULY 17, 2003 [C.P. 839]; 4) DENYING MARY ALICE GWYNN'S EMERGENCY MOTION FOR SANCTIONS AGAINST GARY J. ROTELLA. ESQ., PURSUANT TO 28 U.S.C. §1927 AND 11 U.S.C. §105 IN RESPONSE TO MR. ROTELLA'S LETTERS DATED FEBRUARY 9. 2006, AND MARCH 8, 2006 AND DEBTOR'S ATTACHED "MOTION(S) FOR SANCTIONS....." [C.P.1393]; AND 5)DENYING AS

MOOT MARY ALICE GWYNN'S EMERGENCY MOTION FOR TRANSFERRAL OF MARY ALICE GWYNN'S "EMERGENCY MOTION FOR SANCTIONS. . ." DATED MARCH 15, 2006, AND FILED CONCURRENTLY WITH THIS MOTION, TO BE TRANSFERRED TO THE DISTRICT COURT FOR HEARING [C. P. 13 94]

THIS MATTER came before the Court for hearing on April 17, 2006, upon Mary Alice Gwynn, Esquire's ("Gwynn") Emergency Motion for Sanctions Against Gary J. Rotella, Esq., Pursuant to 28 U.S.C. §1927 and 11 U.S.C. §105 in Response to Mr. Rotella's Letters Dated February 9, 2006, and March 8, 2006 and Debtor's Attached "Motion(s) for Sanctions..... " ("Gwynn's Sanction Motion") [C. P. 1393] which was filed on March 15, 2006; and upon Gwynn's Emergency Motion for Transferral of Mary Alice Gwynn's "Emergency Motion for Sanctions... " Dated March 15, 2006, and Filed Concurrently with this Motion, to Be Transferred to the District Court for Hearing ("Transfer Motion")[C.P. 1394] which was filed on March 15, 2006.

This matter also came before the Court for hearing on February 16, 2006, upon Gary J. Rotella's ("Rotella") Motion For Sanctions Against Mary Alice Gwynn, Esquire, Pursuant To 28 U.S. C. §1927 And 11 U.S.C. §105 Relating To Creditor, Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire, Pursuant To The Court's Order of July 17, 2003 ("Rotella's Motion for Sanctions") [C.P. 839], which was filed on April 21, 2005; and upon James F. Walker's (the "Debtor") Amended Motion for Attorneys' Fees and Costs Against Creditor, Eleanor C. Cole and Mary

Alice Gwynn, Esquire [C.P. 838] (the "Second Amended Discovery Sanctions Motion") which was also filed on April 21, 2005.

BACKGROUND

The Debtor filed for protection under Chapter 7 of the Bankruptcy Code on April 25, 2003. Eleanor C. Cole ("Cole") filed a claim against the estate based upon a final judgment she received against the Debtor in State Court. The Court's docket reflects that Gwynn represented Cole in this case from July 17, 2003 until June 9, 2004.

A. The Numerous Sanctions Motions

This continues to be the most highly litigious and acrimonious case over which this Court has ever presided. Numerous sanctions motions have been, and continue to be brought by each side against the other. The Debtor and/or Rotella have brought three principal motions seeking attorneys' fees and costs against judgment creditor Cole and/or Gwynn as described below.

1. The first principal motion, the Second Amended Discovery Sanctions Motion [C.P.838, which amended C.P.385, which amended C.P. 255], seeks attorneys' fees and costs in the amount of $57,478.25, allegedly incurred by the Debtor in connection with obtaining discovery from Cole. See Rotella's Composite Exhibit "M" subsection "B".[1]

2. The second principal motion, Rotella's Motion

for Sanctions [C.P. 839] initially sought $99,402.50 for attorneys' fees and costs allegedly incurred in connection with Cole's Motion for Sanctions Against Rotella Pursuant To the Court's July 17, 2003 order [C. P. 266] , as detailed in Rotella' s Composite Exhibit "M" subsection "C". The amount of attorneys' fees and costs Rotella now seeks in connection with this matter has increased to $247,613.02 as of February 8, 2006. See Rotella's Ex."O".

3. The third principal motion is the Motion for Sanctions Against Mary Alice Gwynn, Esquire and Creditor Eleanor C. Cole Pursuant to Bankruptcy Rule 9011 [C.P.360] which sought attorneys' fees and costs incurred in connection with Cole's Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Assoc., P.A. ["Rotella P.A."] From Representing the Debtor ("Motion to Disqualify"). The Debtor, Rotella and Rotella P.A. sought attorneys' fees and costs in the amount of $80,572.50 in connection with Cole's Motion to Disqualify as reflected in Rotella's Composite Exhibit "M" subsection "A". The Court awarded these sanctions against Gwynn pursuant to the Court's June 15, 2004, order Granting Motion for Sanctions Pursuant to Bankruptcy Rule 9011 [C.P. 437] and pursuant to the Court's May 11, 2005, order Awarding Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 [C.P. 881] (collectively, "Order Awarding 9011 Sanctions"). On March 17, 2006, the Honorable Alan S. Gold entered an order Vacating Final Judgment of Bankruptcy Court (the "District Court Order") in

> the appeal styled Mary Alice Gwynn v. James F. Walker (In re James F. Walker), in the United States District Court for the Southern District of Florida, Lead Case No.05-80714Civ-Gold/Turnoff consolidated with Case No. 05-80715-Civ-Gold/Turnoff. The District Court Order vacated this Court's Order Awarding 9011 Sanctions determining that imposition of Rule 9011 sanctions was inappropriate given that Gwynn's Motion to Disqualify was denied prior to expiration of Rule 9011's twenty-one day safe harbor period. See District Court Order.

B. The Second Amended Discovery Sanctions Motion

The Second Amended Discovery Sanctions Motion is the third in a series of discovery sanctions motions filed by Debtors' counsel pursuant to the Court's March 22, 2004, order Compelling Creditor, Eleanor C. Cole to Answer Interrogatories; Resetting Hearing on Creditor, Eleanor C. Cole's 2004 Examination (C.P. 237); Permitting Debtor to Submit Motion for Attorneys' Fees and Costs; And Acknowledging Withdrawal of Eleanor C. Cole's Motion for Protective order (as to Linda F. Walden) (C.P. 237), (the "March 22, 2004 Order") [C.P.245]. The March 22, 2004 Order granted Debtor and his counsel permission

> to submit their Motion for Attorneys' Fees and Costs with respect to amounts incurred throughout the process of obtaining Creditor Cole's 2004 Examination including, compelling Creditor Cole to provide complete answers to Debtor's Interrogatories subsequent to Creditor

Cole's filing of Notice of Compliance by Creditor Eleanor C. Cole with Debtor's Interrogatories [C.P. 171] and defending Creditor Cole's various Motions for Protective Order.

March 22, 2004 Order Par.4.

Debtor's first motion pursuant to the March 22, 2004 Order was filed on March 29, 2004, it was titled, Debtor's Motion for Attorneys' Fees and Costs Against Creditor, Eleanor C. Cole, (the "Discovery Sanctions Motion") [C.P. 255]. The Discovery Sanctions Motion sought $29,040.00 in fees and $1,850.39 in expenses incurred in connection with Debtor's efforts to obtain discovery from Cole during the period November 6, 2003 through March 31,2004. On May 25, 2004, Debtor filed a second motion pursuant to the March 22, 2004 Order titled, Debtor's Amended Motion for Attorneys' Fees and Costs Against Creditor, Eleanor C. Cole, (the "Amended Discovery Sanctions Motion") [C.P. 385]. The Amended Discovery Sanctions Motion sought $53,945.00 in fees and $3,533.25 in expenses for the period August 13, 2003 through May 28, 2004. The Amended Discovery Sanctions Motion noted that it included additional time not calculated in the Discovery Sanctions Motion.

The Court's March 22, 2004 Order compelling Cole to cooperate with Debtor's discovery requests had little effect on Cole's discovery misconduct. A year later on April 12, 2005, the Court entered an Order Granting Debtor James F. Wafer's Emergency Motion for Default Judgment Against Eleanor C. Cole as Sanctions for Refusal to Obey Subpoena, Appear and Testify at Deposition, and Amended Motion to Strike

Claim (the "Cole Default order") [C. P. 805] . The Cole Default Order found that Cole, then a pro se litigant, failed to appear or otherwise participate in the April 6, 2005 hearing on Debtor's Emergency Motion for Default Against Cole (the "Motion for Default") [C.P. 772], despite representations by her former counsel, Lawrence U. Taube, that Cole was properly served with the Motion for Default. Cole Default Order at 1. Debtor's counsel's efforts to obtain discovery from Cole from August 13, 2003 through March 25, 2005 are detailed in the Cole Default Order, and they need not be repeated here. See Cole Default Order at 5-17. Among other things, the Cole Default Order found:

> that Cole's refusal to appear and testify at her deposition, while under Subpoena, or to otherwise participate in discovery after twenty (20) months of scheduling and rescheduling her examination, was willful and in complete disregard for this Court, its law and the parties involved in this Proceeding. . . Id. at 17.

As a consequence of Cole's conduct, the Court struck Cole's Proof Of Claim No. 2 and entered a Final Default Judgment against her for $57,478.25, the amount requested in the Amended Discovery Sanctions Motion.[2]

The Amended Discovery Sanctions Motion and various other motions had been set for hearing for April 21, 2005, before entry of the Cole Default Order on April 12, 2005. At the April 21, 2005 hearing, Gwynn stated her belief that the Amended Discovery Sanctions Motion related solely to Cole, not to herself, as she had not been named in the Amended Motion. Debtor's

counsel replied that the Amended Discovery Sanctions Motion related to both Cole and Gwynn. The Court noted that a completely different sanctions motion, Debtor's Motion for Sanctions Against Mary Alice Gwyn, Esq. And Eleanor C. Cole Pursuant to Bankruptcy Rule 9011 [C.P. 360], was scheduled and that the Amended Motion would not be heard that day.[3] on April 21, 2005, directly after the hearing, Rotella on behalf of the Debtor filed the Second Amended Discovery Sanctions Motion against both Cole and Gwynn for attorneys' fees and costs incurred in connection with Debtor's counsel's effort to obtain discovery from Cole.

The Second Amended Discovery Sanctions Motion was ultimately scheduled for hearing on February 16, 2006, along with Rotella's Motion for Sanctions.

C. Rotella's Motion for Sanctions

Rotella's Motion for Sanctions was originally filed on July 7, 2004 as Rotella's Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire Pursuant To The Court's Order Of July 17, 2003, ("Rotella's Rule 9011 Sanctions Motion") [C.P. 463] . Rotella's Motion for Sanctions seeks sanctions against Gwynn for her having filed: a) on April 5, 2004, Cole's Motion For Sanctions Against Gary J. Rotella, Esq. Pursuant To The Court's Order Entered On July 17, 2003 ("Cole' s Motion For Sanctions"); b) on April 8, 2004, Cole's Supplement To Motion For Sanctions Against Gary J. Rotella, Esq. Pursuant To the Court's Order Entered On July 17,

2003 ("Cole's Supplement To Motion For Sanctions"); c) on April 28, 2004, Cole's Objection And Response To Susan Lundborg's Motion For Reconsideration Of Order Finding Susan Lundborg In Contempt Of Court And Awarding Sanctions ("Cole's Response To Susan Lundborg"); and d) on May 3, 2004, Cole's Motion To Have The Court Declare The Procurement Of The Sale To The [sic] Susan Lundborg Void, As It Was Procured By Fraud ("Cole's Procurement Motion").

On May 28, 2004, Gwynn, in open Court, announced that she was withdrawing Cole's Motion for Sanctions, and Cole's Supplement to Motion For Sanctions (collectively, "Cole's Motion For Sanctions"). On June 15, 2004, the Court entered an Order Withdrawing Creditor Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire Pursuant To The Court's Order Of July 17, 2003 ("Order Withdrawing Cole's Motion for Sanctions")[C.P.#439].

Despite entry of the order Withdrawing Cole's Motion for Sanctions, Rotella's Rule 9011 Sanctions Motion was set for hearing on April 21, 2005, along with the Second Amended Discovery Sanctions Motion which is further discussed below. At the April 21, 2005 hearing, Gwynn pointed out, and Rotella conceded, that Rotella had not sent the required twenty-one (21) day safe harbor communication to Gwynn for Rotella's Rule 9011. Sanctions Motion. The Court thereupon denied the Rule 9011 Sanctions Motion without prejudice to it being refiled under any other appropriate grounds. See Order Denying Debtor's Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 and 11 U.S. C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J.

Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 Without Prejudice ("order Denying Rule 9011 Sanctions") [C. P. 880] .

The instant Rotella's Motion for Sanctions was filed directly after the hearing on April 21, 2005. Other than the change in the title, preamble and relief sought from Bankruptcy Rule 9011 to 28 U.S.C. §1927, both motions are identical. Evidentiary hearings on Rotella' s Motion for Sanctions were conducted over two days, on May 20, 2005 and on June 16, 2005 (collectively, the "Sanctions Hearing").

On August 29, 2005, the Court entered an Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. §.1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 (the "Order")[C.P.1142]. The Order granted Rotella's Motion for Sanctions, and awarded $39,057.50 of the $99,402.50 Rotella sought in attorneys' fees and expenses as listed in Rotella's Composite]Exhibit "M" subsection "C"[4] (the "Fee Statement"). In addition to the Order, the Court contemporaneously entered an Appendix To Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire, Pursuant to 28 U.S.C. §.1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 (the "Appendix") [C.P.1144]. The Appendix was the Court's annotated version of Rotella's Fee Statement. The Appendix disallowed seven categories of Rotella's time log entries which the Court found: 17 lacked adequate description; 2)were duplicative; 3) were excessive; 4)

were unnecessary; 5) were administrative tasks; 6) were for travel; or 7)were related to a different Cole motion that was not the subject of the Order.

Both Rotella and Gwynn filed motions for reconsideration of the Order; those motions were set for hearing on September 29, 2005. On October 7, 2005, the Court entered an Order Vacating Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. §1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 [C.P.1216], wherein the Court vacated the Order based upon the Order's premature award as to the amount of fees.[5]

On October 7, 2005, the Court entered an Amended Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. §1927 and 11 U.S.C. §105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003 (the "Amended Order") [C.P.1217]. The Amended Order determined that Rotella was entitled to an award of sanctions against Gwynn pursuant to 11 U.S.C. §1927 and 11 U.S.C. §105, but it reserved jurisdiction to determine the amount of sanctions to be imposed. In addition, the Amended Order made numerous specific findings relating to Gwynn's failure to conduct routine investigation before lodging unfounded allegations against Rotella, and to Gwynn's having made inconsistent and contrasting allegations between motions. The Amended Order found Gwynn's allegations to be vexatious, frivolous, and an abuse of process which unreasonably multiplied the proceedings

in this case in violation of 11 U.S.C. §1927 and 11 U.S.C. §105. See Amended Order.

As discussed below the Court, having reviewed Rotella and Gwynn's submissions, the District Court order, and the applicable law, hereby vacates the Amended Order.

D. The February 16, 2006 Hearing

At the commencement of the February 16, 2006 hearing to consider the Second Amended Discovery Sanctions Motion and the amount of sanctions to be imposed against Gwynn pursuant to the Amended order on Rotella's Motion for Sanctions, Gwynn announced that her Emergency Motion for Rehearing and Reconsideration of this Court's "Order Denying Mary Alice Gwynn's Emergency Motion for Recusal of the Honorable Paul J. [sic] Hyman Pursuant to Bankruptcy Rule 5004, 28 U.S.C. §455 and §144" ["Recusal Order"] and "Order Denying Mary Alice Gwynn's Emergency Motion to Stay the Hearing on Debtor's Renewed Motion Scheduled for Bebruary [sic] 16, 2006" ["Stay Order"] dated February 10, 2006, Based Upon Additional Doucmentation [sic] Filed ("Reconsideration Motion") [C.P. 1314] required the Court's determination before the hearing could go forward. The Court informed Gwynn that it had denied her Reconsideration Motion in its February 14, 2006, Order Denying Mary Alice Gwynn's Emergency Motion for Rehearing and Reconsideration of this Court's "Order Denying Mary Alice Gwynn's Emergency Motion for Recusal of the Honorable Paul J. [sic] Hyman Pursuant to Bankruptcy Rule 5004, 28 U.S.C. §455 and §144" and "Order Denying Mary Alice Gwynn's Emergency Motion to Stay the Hearing on Debtor's Renewed Motion

Scheduled for Bebruary [sic] 16, 2006" dated February 10, 2006, Based Upon Additional Doucmentation [sic] Filed ("Order Denying Reconsideration") [C.P.1319].

Gwynn thereupon stated that she was prepared to file an appeal of the Recusal Order, the Stay Order, and the Order Denying Reconsideration, and she further declared that she would not participate in the hearing until the District Court determined her appeal of the Recusal Order. The Court reiterated its ruling denying Gwynn' s motion to stay the hearing pending appeal of the Recusal Order because: 1) the Court believed it was an interlocutory order; and 2) Gwynn failed to state any grounds that would allow her to proceed with an interlocutory appeal. The Court further noted that the hearing had been set for some time and this was the second setting.[6] Gwynn repeated her refusal to participate in the hearing. The Court thereupon granted Gwynn' s request to leave the courtroom, and she left. Debtor's counsel proceeded with its case unopposed.

CONCLUSIONS OF LAW

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a proceeding arising in a case under title 11 pursuant to 28 U.S.C. § 157(b)(1).

I. The Second Amended Discovery Sanctions Motion

The Debtor filed the Second Amended Discovery Sanctions Motion against Cole and Gwynn pursuant to the Court's March 22,2004 order which granted Debtor

and his counsel permission to submit a motion for attorneys' fees and costs incurred in connection with their efforts to obtain discovery from Cole. The Second Amended Discovery Sanctions Motion, however, does not cite any authority other than the March 22, 2004 order, as a basis for an award of attorneys' fees and costs against Gwynn. Therefore it is left to the Court to determine on what basis, if any, an imposition of sanctions against Gwynn would be appropriate.

The Court has both statutory authority and inherent power to award sanctions when required. The Court has inherent power to sanction attorneys who act in bad faith, vexatiously, wantonly or for oppressive reasons Chambers v. Masco, Inc., 501 U.S. 32, 45-46 (1991). The exercise of such powers by a Bankruptcy Court is consistent with the authority granted by 11 U.S.C. § 105 to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." See, e.g., Jove Eng'g, Inc., v. Internal Revenue Service, 92 F. 3d 1539 (11th Cir. 1996). "However because of their potent nature,'inherent powers must be exercised with restraint and discretion.'" In re Mroz, 65 F. 3d 1567, 1575 (11th Cir. 1995) (citing Chambers, 501 U.S. at 42-43). When conduct can be "adequately sanctioned under the Rules, the Court should ordinarily rely on the Rules rather than their inherent power." Chambers, 501 U.S. at 50. Bankruptcy Rule 7037 "Failure to Make Discovery: Sanctions" deals directly with the type of discovery abuses complained of in the Second Amended Discovery Sanctions Motion.[7] Bankruptcy Rule 7037 applies to contested matters as well as to adversary proceedings. See B. R. 9014 (c). Thus the Court finds that Bankruptcy Rule 7037, rather than the Court's inherent power, is the appropriate authority to rely

upon in this matter.[8]

Bankruptcy Rule 7037 states in pertinent part:

> (a) Motion for Order Compelling Disclosure or Discovery (4) Expenses and Sanctions.
>
> > (4)If the motion is granted . . . the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, . . .
>
> (b) Failure to Comply with Order
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, . . .
>
> (d) Failure of Party to Attend at own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection
>
> In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure...

B.R. 7037 (emphasis added)

Rule 7037 subsection (a) provides the procedure for motions for orders compelling disclosure and discovery. B.R.7037(a). Rule 7037 subsections (b) and (d) provide for sanctions against a party who fails to comply with a court order compelling disclosure and discovery, fails to attend their own deposition, or fails to serve answers to interrogatories. B.R.7037 (b) and (d). In each instance, the attorney may also be sanctioned under Rule 7037.

Discovery abuses frustrate the purpose of the Federal Rules of Civil Procedure which is to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. "Rule [7037] sanctions must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.'" Roadway Exp., Inc. v. Piper, 447 U.S. 752, 763 (1980) (quoting Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643 (1976)). Rule 7037 sanctions "serve a threefold purpose. Preclusionary orders ensure that a party will not be able to profit from its own failure to comply. Rule [7037] strictures are also specific deterrents and, like civil contempt, they seek to secure compliance with the particular order at hand. Finally, although the most drastic sanctions may not be imposed as 'mere penalties,' courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault." JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Serv. Inc., (S.D.N.Y. 2005) 2005 WL 1958361 *10

(quoting Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures, Corp., 602 F. 2d 1062, 1066 (2d Cir. 1979)). Rule 7037 thus gives the Court discretion to apportion fault for discovery abuses by permitting the Court to impose sanctions upon a party, its attorney or both. Devaney v. Continental American Ins. Co., 989 F. 2d 1154, 1160 (11th Cir. 1993)

The Court previously ruled that "Cole's refusal to appear and testify at her deposition, while under Subpoena, or to otherwise participate in discovery after twenty (20)months of scheduling and rescheduling her examination, was willful and in complete disregard for this Court, its law and the parties involved in this Proceeding." Cole Default order at 17. However, the Court finds that there has been no evidence presented that Cole's obstructive discovery conduct was Gwynn's fault, having either been carried out at Gwynn's direction or upon Gwynn's advice. Absent evidence of Gwynn's culpability in advising Cole not to appear and testify at her deposition, or to otherwise not participate in discovery, there exists no basis pursuant to B.R. 7037 or pursuant to any other authority, for the Court to assess sanctions against Gwynn for Cole's discovery misconduct. Accordingly, the Second Amended Discovery Sanctions Motion is denied as to Gwynn.

II. The Amended Order on Rotella's Motion for Sanctions is Vacated

A. The Amended Order's Conclusions of Law are Incorrect

The Amended order on Rotella's Motion for Sanctions determined that imposition of sanctions against Gwynn was appropriate pursuant to 28 U.S.C. §1927 and 11

U.S.C. § 105.

Section 1927 of title 28 of the United States Code provides:

> Any attorney or other person admitted to conduct such cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. §1927

The Amended order noted three requirements for imposition of sanctions pursuant to §1927: 1) the attorney in question must engage in "unreasonable and vexatious" conduct; 2) such conduct must multiply the proceedings, and 3) "the dollar amount of the sanction must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the 'costs, expenses, and attorneys' fees reasonably incurred because of such conduct.'" Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11th Cir. 1997) (citing 28 U.S.C. § 1927). However upon review, the Court finds that the Amended order failed to fully examine section 1927's requirements. In light of the recently entered District Court Order, the Court does so now.

"There is little case law in this circuit concerning the standards applicable to the award of sanctions under §1927." Id. "Moreover, decisions from other circuits are not in agreement on the governing principles. Some

circuits have held that subjective bad faith is required for an award [of sanctions] under §1927. Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986); Hackman v. Valley Fair, 932 F.2d 239, 242 (3d Cir. 1991). Other circuits have held that it is not. See Wilson-Simmons v. Lake County Sheriff's Dep't, 207 F.3d 818, 824 (6th Cir. 2000); Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1342 (10th Cir. 1998)." Footman v. Cheung, 341 F. Supp. 2d 1218, 1222-23 (M.D. Fla. 2004).

The Eleventh Circuit recently acknowledged that its "cases are perhaps somewhat unclear [with respect to the requirements of section 1927]; either they require subjective bad faith, which may be inferred from reckless conduct, or they merely require reckless conduct, which is considered 'tantamount to bad faith.'" Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1178 (11th Cir. 2005). The Cordoba court speculated as to whether the distinction is ever significant, and declined to provide an answer since it was not important for purposes of that case. Id.

The Amended Order in this case omitted any consideration of Gwynn's subjective bad faith, or of whether her conduct was tantamount to bad faith. Thus, the Amended Order's finding that Gwynn was liable for sanctions pursuant to section 1927 is not in keeping with the Eleventh Circuit's test for imposition of section 1927 sanctions and the Amended Order must be vacated.[9]

The Amended Order also found Gwynn liable for sanctions pursuant to 11 U.S.C. §105, which states in pertinent part:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a)

The Eleventh Circuit has found that section 105 gives bankruptcy courts civil contempt powers to impose monetary sanctions when there is clear and convincing evidence that a court order has been violated, as for example, in the event of a willful automatic stay violation. See Jove Eng'g, Inc.,92 F.3d 1539. The Amended Order cited Hardy v. United States (In re Hardy), 97 F. 3d 1384, 1389-90 (11th Cir. 1996)[10] as authority for the distinction between section 105's grant of statutory contempt powers in the bankruptcy context, and the court's inherent contempt powers which require a finding of "bad faith". Id. The Amended Order then incorrectly implied that pursuant to section 105 bankruptcy courts may sanction an attorney who unreasonably and vexatiously multiplies the proceedings without making a finding of subjective bad faith or conduct tantamount to bad faith. The Amended Order cited In re Volpert, 110 F. 3d 494, 500 (7th Cir. 1997) (citing Caldwell v. Unified Capital Corp. (In re Rainbow Magazine), 77 F. 3d 278, 283-84 (9th Cir. 1996) ; Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.), 40 F.3d 1084, 1089 (10th Cir. 1994)), as authority for

imposition of sanctions pursuant to section 105 for unreasonable and vexatious multiplications of proceedings without finding subjective bad faith or conduct tantamount to bad faith. However, bad f aith was a factor in each of those cases. In Rainbow Magazine and Courtesy Inns, section 105 sanctions were imposed for bad faith filings of bankruptcy petitions. Id. at 501. In Volpert, the Seventh Circuit affirmed a bankruptcy court award of sanctions for an attorney's bad faith filings, however Volpert found that the appropriate sanctioning mechanism was 11 U.S.C. § 105 rather than 28 U.S.C. §1927 which was the bankruptcy court's basis for the award.[11] Id.

This Court does not interpret section 105 to permit an award of attorney's fees for unreasonable and vexatious multiplication of proceedings absent a finding of subjective bad faith or conduct tantamount to bad faith. Fee shifting is generally prohibited under the American Rule. With the exception of very "narrowly defined circumstances," each party pays its own way. Chambers, 501 U.S. at 45 (citations omitted). The Court finds that Congress did not intend to allow bankruptcy courts to impose sanctions pursuant to 11 U.S.C. § 105 using a less stringent standard than that required for imposition of sanctions pursuant to 28 U.S.C. §1927. To the extent that the Amended order implied that sanctions may be imposed for unreasonable and vexatious multiplication of proceedings pursuant to § 105 absent a finding of subjective bad faith, or conduct tantamount to bad faith, the Amended order was incorrect.

B. The Court Reaffirms the Amended Order's Findings Notwithstanding the Amended order's incorrect interpretation of law, its findings of fact are correct.

Rotella's Motion for Sanctions is based upon Gwynn's having filed Cole's Motion for Sanctions, Cole's Supplement to the Motion for Sanctions, Cole's Response to Susan Lundborg, and Cole's Procurement Motion. One of the primary themes of Cole's Motion For Sanctions is that "Rotella orchestrated a well thought out plan to sell the Cat Cay Property during July, 2003." This theme was similarly expounded upon in Cole's Response To Susan Lundborg, and Cole's Procurement Motion. However, some of the allegations in Cole's Response to Susan Lundborg and Cole's Procurement Motion contradict the allegations in Cole's Motion for Sanctions. Cole's Motion For Sanctions asserts that Rotella orchestrated the sale of the Cat Cay property, while Cole's Response To Susan Lundborg asserts that Susan Lundborg and her attorney Stephen A. Turnquest were solely responsible for the sale of the Cat Cay property. In addition to these contrasting allegations, the motions contain numerous allegations against Rotella including that he had perpetrated a fraud upon the Court, that he was "generally dishonest", and that he had not been forthright with the creditors or trustee.
The Court hereby reaffirms the Amended order's findings of fact as follows:

1. Gwynn neither produced nor admitted any competent evidence to establish that she had any basis in fact or law as of April 5, 2004, to support the allegation within Cole's Motion For Sanctions that Rotella "orchestrated a well thought out plan" to sell

the Cat Cay Property during July 2003.

2. Gwynn failed to produce any evidence to support the allegation that Rotella created a sham or perpetrated a "fraud on this Court" with respect to filing Debtor's Emergency Motion To Stay Sale Of Debtor's Interest In Real Property In Violation Of 11 U.S.C. § 362, B.R. 6004-1 And Local Rule 6004-1 ("Motion to Stay Sale").

3. Rotella took Gwynn's Deposition on June 8, 2004 prior to filing his 9011 Motion For Sanctions. While Gwynn said that the allegations in Cole's Motion for Sanctions were true and correct when she signed them, she evaded questions regarding her factual basis for alleging that Rotella orchestrated the sale of the Cat Cay Property. Gwynn repeatedly objected to Rotella's questions on the basis that her answers were protected by work product and/or attorney-client privilege. She evaded answering by repeating her objections, and by referring to Cole's Motion for Sanctions saying "the pleading speaks for itself." Gwynn' s attempts to offer any factual predicate for filing Cole's Motion for Sanctions were disjointed and fragmented.

4. Gwynn's refusal to answer questions relative to any factual and legal basis for the allegations contained in Cole's Motion for Sanctions at the June 8,2004 deposition, was not remedied by the Sanctions Hearing. Gwynn's testimony was disjointed, confused, incoherent, and oftentimes unresponsive to the questions. Gwynn gave no credible testimony establishing any factual or legal basis as of April 5, 2004 for the allegations she advanced against Rotella in Cole's Motion for Sanctions.

5. Gwynn alleged in Cole's Motion for Sanctions that Rotella was "generally dishonest." Paragraph 5 accuses Rotella of disregarding Bankruptcy Rules, continually making false representations to this Court, and being other than forthright with "any of the creditors, the Trustee and/or counsels." In support of this allegation Gwynn testified at the Sanctions Hearing that Rotella never listed the Receivership Proceeding in the Debtor's original Statement Of Financial Affairs. The Statement of Financial Affairs filed with the Court on May 23, 200 lists the Receivership Proceeding[12] as pending. When Rotella pointed out that the Receivership Proceeding was listed as pending, Gwynn claimed that she did not see this entry on the "initial" Schedules. However, the record reflects that the Debtor's Schedules were never amended. It is clear that Gwynn did not investigate whether Rotella listed the Receivership Proceeding because this could have been verified easily by reading the Debtor's Statement of Financial Affairs. Gwynn had no basis on April 5, 2004 for her allegation that Rotella was "generally dishonest" in not listing the Receivership Proceeding. She did not provide any competent evidence to the contrary throughout the Sanctions Hearing.

6. Gwynn alleged that Rotella deceived the Court and creditors by failing to list the Cat Cay Property in response to Question 6 in the Debtor's Statement of Financial Affairs, which requires a list of all property "which has been in the hands of a custodian, receiver, or court appointed official within one year immediately proceeding the commencement of the case." Gwynn testified that this response was a false representation by Rotella because the State Court Receiver, Linda

Walden, was about to take control of the Cat Cay Property. Although it was Gwynn's contention that the Receiver was about to take control of the Cat Cay Property, in fact the Receiver had not been in control of it at any time prior to the Debtor filing his Statement of Financial Affairs. The Court finds that Gwynn's allegations of Rotella's "general dishonesty," his disregarding Bankruptcy Rules, his continually making false representations to this Court, and his being other than forthright with "any of the creditors, the Trustee and/or counsels" were unreasonable.

7. Gwynn alleged in Paragraph 5 of Cole's Motion For Sanctions that Rotella failed to disclose or otherwise list the Debtor's interest in real property in Washington County, Florida (the "Washington County Property") in the Debtor's Statement of Financial Affairs and accompanying Schedules. However Question 10 of the original Statement of Financial Affairs does list the Debtor's interest in the Washington County Property along with its full legal description. Gwynn should have reviewed Question 10 before making this allegation. Consequently, the Court finds that Gwynn had no basis on April 5, 2004 for her allegation that Rotella was "generally dishonest" in not listing the Washington County Property and provided no evidence to the contrary throughout the Sanctions Hearing.

8. Gwynn alleged at paragraph 7 of Cole's Motion for Sanctions that Rotella's listing the Debtor's interest in the Cat Cay Property as exempt was another example of Rotella's general dishonesty and being other than forthright with "any of the Creditors, the Trustee and/or counsels." Cole's Motion for Sanctions and

Gwynn's testimony at the Sanctions Hearing alleged that Rotella knew all along that the property was held as tenants in common. This allegation is unfounded both in fact and in law. While the Debtor's position that the Cat Cay Property was exempt as a tenancy by the entireties was disallowed by the Court, Gwynn had no factual basis for accusing Rotella of dishonesty for taking the legal position that the Cat Cay Property was exempt from the Debtor's estate. Gwynn undertook no investigation to substantiate her allegation. She did not depose Rotella or ask him about any legal research he may have conducted on the question of whether the Cat Cay Property was exempt prior to the Debtor's filing his Statement of Financial Affairs and Schedules. Consequently, the Court finds that Gwynn had no basis on April 5, 2004, in fact or law, for her allegation that Rotella was "generally dishonest" in listing the Debtor's interest in the Cat Cay Property as exempt. She provided no competent evidence to the contrary throughout the Sanctions Hearing.

9. Gwynn accused Rotella of failing to send a Suggestion of Bankruptcy to the Trustee, Linda Walden. However, the Certificate of Mailing on the Suggestion of Bankruptcy shows that it was sent by U.S. Mail and Facsimile to "H. Michael Muniz, Esquire, Sachs, Sax & Klein, P.A., Attorneys for Receiver, Linda J. Walden, MBA, CPA, Northern Trust Plaza, 301 Yamato Road, Suite 4150, Boca Raton, FL 33431. . . this 25th day of April, 2003". Gwynn asserted that H. Michael Muniz never received the Suggestion of Bankruptcy and that a review of her correspondence with Mr. Muniz refreshed her recollection that he did not receive the Suggestion of Bankruptcy either. However, Gwynn neither produced the

correspondences or records of these exchanges, nor did she have Mr. Muniz testify before the Court. The prima facie proof of service established by the Certificate of Service is presumptively valid as a matter of law. Gwynn provided no competent evidence establishing that she had any factual or legal basis for having made the allegation that Rotella never sent the Suggestion of Bankruptcy to the Receiver or her counsel.

10. Gwynn alleged in Paragraph 14 of Coles' Motion for Sanctions that attorney Collie never received a Notice of Filing Chapter 7 Bankruptcy. Gwynn's allegation is similarly without merit because Gwynn produced no evidence to counter the Certificate of Service.

11. Throughout her June 16, 2005 hearing testimony, Gwynn said that she would be "bringing matters" before this Court by way of her "Motion for All Remedies," which was heard and decided by the Court on July 1, 2005. The Court's Order Denying Motion for All Remedies [C. P. 11031 found that there was no evidence to support Gwynn's Sanctions Hearing allegation that ". . . there's some fee-splitting going on with other people." The Court did however find that Rotella untimely filed his Second Amended Disclosure of Compensation of Attorney for Debtor to the United States Trustee ("Second Amended Disclosure of Compensation"), but there was no evidence of any intentional wrongdoing by Rotella. Gwynn did not raise the limited issue of timeliness in Cole's Motion For Sanctions or at the Sanctions Hearing. Consequently, the Court finds that Gwynn lacked any basis in fact or law as of April 5, 2004 to have alleged that Rotella engaged in illegal fee splitting. She produced no

competent evidence to support her allegation at either the Sanctions Hearing or the hearing on Motion For All Remedies.

12. Gwynn alleged at Paragraph 5 of Cole's Motion For Sanctions that Rotella's failure to obtain Court approval for his guarantee of payment by the Debtor's wife exemplifies Rotella's alleged disregard for Bankruptcy Rules, his false representations to the Court, and his being other than forthright with "any of the creditors, the Trustee and/or counsels". At the June 16, 2005 hearing, Gwynn suggested that Bankruptcy Rule 2016 requires that Rotella obtain a court order approving his fee arrangement with the Debtor's wife, Carol Ann Walker. Rule 2016(b) requires the attorney to file a statement disclosing compensation with the United States Trustee, but the rule does not require the attorney to receive a court order to approve the arrangement for compensation. Rotella's Second Amended Disclosure of Compensation reports that Rotella received additional compensation from the Debtor's son as well as the guarantee of payment from Carol Ann Walker, the Debtor's wife, from her fifty-percent (50%) interest in the proceeds of the sale of the Cat Cay Property. Although Rotella's Second Amended Disclosure of Compensation was untimely filed, there was no evidence of intentional wrongdoing on Rotella's part.[13] Because there is no requirement for obtaining Court approval, Gwynn could not possibly have had any legal basis for this allegation.

13. Gwynn alleged in Paragraph 6 of Cole's Motion For Sanctions that Rotella filed an Ex-Parte Motion for Extension of Time in Which to File Statement of Financial Affairs and Schedules ("Ex-Parte Motion to

Extend") knowing all along that Creditor Cole had counsel and that Walden was appointed as a Receiver. She further alleged that none of the parties received copies of Rotella's Ex-Parte Motion To Extend. However Gwynn's testimony at the June 16, 2005 hearing revealed that she made no inquiry of any of the creditors or other interested parties listed on the Certificate Of Service as to whether they had received the Ex-Parte Motion to Extend. Local Rule 9013-1 (C)(2)[14] permits ex-parte relief for an extension of time to file the Statement Of Financial Affairs and Schedules. Rotella's Ex-Parte Motion to Extend dated May 7, 2003 and filed May 9, 2003 bears a Certificate Of Service listing ten (10) creditors and/or other interested parties, including the then-Trustee, Deborah Menotte, as well as Cole's counsel, H. Michael Muniz. Gwynn offered no evidence or testimony that Muniz was not served with the Ex-Parte Motion to Extend. Moreover, Walden was not the Trustee at this point in the case, she was merely the Receiver from a State Court action against the Debtor. Gwynn produced no evidence that either she or Walden had requested notice of all motions in the case. Therefore, neither Gwynn nor Walden were entitled to notice. Gwynn's failure to receive notice is not a ground upon which to sanction the Debtor's attorney. This is an example of Gwynn's continuing failure to examine the Local Rules before lodging unfounded allegations.

14. Gwynn alleges in Paragraph 22 of Cole's Motion For Sanctions, that Rotella's filing Debtor's Motion To Stay Sale on July 15, 2003 was a "sham and a fraud on this Court," and that the sale of the Cat Cay Property was, in tandem, "orchestrated by Lundborg, along with Rotella, Turnquest and Collie (who) have a hidden

agenda to purchase the Cat Cay property at a discount price and turn around and flip the property as soon as the sale had gone through, at a much higher price".[15] Rotella asked Gwynn whether she had any evidence to support the allegations of his wrongdoing set forth within Cole's Motion For Sanctions in Paragraphs 9, 11, 14, 15, 16, 20, 21, 23, 26 and 27. Gwynn generally testified that she was without anything material to offer in terms of documentary evidence or testimony to substantiate her allegations.

15. Gwynn testified at the May 20, 2005 hearing, that the Debtor fraudulently obtained an order from the court in his criminal case that allowed him to travel to the Bahamas to sell the Cat Cay Property. The transcript of the July 3, 2003 hearing[16] reflects that the State Court authorized the Debtor to travel to California and to travel to the Bahamas if the Cat Cay Property was sold by order of the Bankruptcy Court. This Court sees nothing improper with the Debtor's criminal counsel requesting permission from the State Court for the Debtor to travel to the Bahamas in the event that this Court ordered him to attend the sale of the Cat Cay Property. Whatever concerns Gwynn had regarding the State Court's July 3, 2003 authorization for the Debtor's travel to the Bahamas, she did not raise those concerns in State Court, but waited until she filed Cole's Motion for Sanctions ten months later. Gwynn provided no competent evidence for alleging that Rotella committed "a sham and a fraud on this Court" by "generating" or otherwise procuring a fraudulent order from the State Court allowing the Debtor to travel to the Bahamas to complete a sale of the Cat Cay Property.

16. Gwynn alleged in Cole's Motion For sanctions at Paragraph 15 that "attorney Collie also informed Walden of other instructions he received from Rotella, that will prove Rotella orchestrated this whole sale in July, hoping that the sale would go through covertly, before anyone here would have knowledge of it. . . . Walden will present additional testimony on the conversations that she had with attorney Collie." Walden, under Subpoena Duces Tecum issued by Gwynn, failed to appear and testify at the May 20, 2005 hearing and again failed to appear and testify at the June 16, 2005 hearing as required under the Renewed Subpoena Duces Tecum. Walden's failure to testify notwithstanding, Gwynn produced no evidence whatsoever to substantiate, or otherwise establish, that she had any basis in fact or in law for making the allegations against Rotella on April 5, 2004. Gwynn's references to the Bahamian Court orders as "doctored" are similarly unsubstantiated. In addition, the testimony of Gwynn's witness, Robert Angueira, did not support Gwynn's allegations that the Bahamian Court orders were "doctored."

17. At the June 16,2005 hearing, the Court attempted to understand Gwynn's allegation that Rotella' s Motion to Stay the Sale was a fraud on the Court. Gwynn testified that Rotella' s objective in filing the Motion to Stay the Sale was to put herself, Linda Walden, and Robert Angueira in a bad light. Gwynn further testified that the Debtor's attempt to stop the sale was contradicted by the Debtor's attempt to get an order from the State Court allowing him to travel to the Bahamas so that he could complete the sale. The record reflects that the Debtor's primary objective in filing the Motion to Stay the Sale was to stop the sale of

the Cat Cay Property to Susan Lundborg. Therefore, the Debtor's intentions in filing the Motion to Stay the Sale were not fraudulent.

18. Gwynn alleged that the Debtor sought contradictory relief in State Court and in this Court. On the one hand, she alleged that the Debtor sought permission to travel to the Bahamas to complete a covert sale of the Cat Cay Property in league with Rotella, Susan Lundborg, and her attorneys. On the other hand, she alleged that Rotella and the Debtor sought contradictory relief from this Court when they sought to stop the sale to Susan Lundborg. The July 3, 2003 hearing transcript reveals that the Debtor did not seek contradictory forms of relief in this Court and the State Court. First, the Debtor sought an order only that would permit him to travel to California where his son lives. Second, the Debtor sought permission from the State Court to travel to the Bahamas in case this Court authorized the sale of the Cat Cay Property. Finally, subsequent to the Debtor's filing his bankruptcy petition, he moved this Court to stay the sale in case he prevailed on his claim that the Cat Cay Property was exempt. There is no evidence that the Debtor sought to complete a covert sale to Susan Lundborg without this Court's knowledge. On the contrary, the Debtor has fought the sale of the Cat Cay Property since the Debtor's interest in the Cat Cay Property became an object of interest for creditors. Had Gwynn read the July 3, 2003 hearing transcript with minimal care and attention, she would have determined that the Debtor did not seek contradictory forms of relief. The allegation that the Motion to Stay the Sale was a fraud on the Court is wholly without merit.

19. The Court notes that many of Gwynn's allegations would not have been lodged, if she had undertaken the most routine forms of investigation and research. One form of investigation would have been for Gwynn to take Rotella's Deposition prior to filing Cole's Motion For Sanctions. However, she did not. Instead, she took Rotella's Deposition some seven (7) weeks after filing Cole's Motion For Sanctions, and only four (4) days before the scheduled hearing on Cole's Motion For Sanctions. Moreover, there is no excuse for her failure to acquaint herself with the Federal Rules of Bankruptcy Procedure and the Local Rules, or to read the July 3, 2003 hearing transcript closely.

C. The Court Finds Gwynn's Conduct is Tantamount to Bad Faith

There is no doubt that Gwynn's conduct, as evidenced by the above findings, was objectively unreasonable and vexatious. However, the Court's Amended Order did not consider whether Gwynn's vexatious and unreasonable conduct was conduct tantamount to bad faith or carried out in subjective bad faith, as required in the Eleventh Circuit for imposition of sanctions pursuant to 11 U.S.C. 1927. Cordoba, 419 F.3d at 1178. "In assessing whether an award is proper under the bad faith standard, the inquiry will focus primarily on the conduct and motive of a party, rather than the validity of the case.'" Footman, 341 F. Supp. 2d at 1223 (citing Rothenburg v. Sec. Mgmt. Co., Inc., 736 F. 2d 1470, 1472 (11th Cir. 1984)). Subjective bad faith requires an improper motive, such as for example, a motive to delay judicial proceedings. Subjective bad faith is a higher standard than objective bad faith which does not

require conscious impropriety. Jerelds v. City of Orlando, 194 F. Supp. 2d 1305, 1312 (M.D. Fla. 2002)(citations omitted).

Conduct tantamount to bad faith may be found where "an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering the enforcement of a court order." Footman, 341 F. Supp. 2d at 1223 (citing Barnes v. Dalton, 158 F. 3d 1212, 1214 (11th Cir. 1998)). A finding that conduct is tantamount to bad faith is also warranted "where an attorney knowingly or recklessly pursues a frivolous claim or engages in litigation tactics that needlessly obstruct the litigation of nonfrivolous claims." Bernstein v. Boles, Schiller & Flexner, LLP, 2006 WL 465054 *2 (S.D. Fla. 2006) (citing Schwartz v. Million Air, Inc., 341 F. 3d 1220, 1225 (11th Cir. 2003)). Section 1927 is designed to sanction attorneys who willfully abuse the judicial process by conduct tantamount to bad faith. Id.

In this matter the Court finds that Gwynn's conduct has been sufficiently reckless to warrant a finding of conduct tantamount to bad faith. The Court further finds that her frivolous claims were prosecuted for the purpose of harassing her opponent such that her conduct has been tantamount to bad faith. Gwynn failed to conduct even the most routine investigation before lodging completely unfounded allegations regarding Rotella's honesty and candor with the Court. It is bad faith and an abuse of process for Gwynn to lodge unfounded and uninvestigated allegations that opposing counsel perpetrated a fraud upon the Court and was

generally dishonest, then withdraw the pleadings containing those allegations at the hearing without notice to Rotella, and maintain that based upon that withdrawal she should not be sanctioned. The above-detailed findings evidence Gwynn's bad faith and willful abuse of the judicial system which multiplied the proceedings in this case unreasonably and vexatiously.

D. Due Process

Rotella's Motion for Sanctions was originally filed as Rotella's Rule 9011 Sanctions Motion. Federal Rule of Civil Procedure 11[17] is aimed primarily at pleadings. Byrne v Nezhat, 261 F. 3d 1075, 1106 (11th Cir. 2001). The analysis in considering a motion for sanctions pursuant to Rule 9011 is a two step inquiry: "1) whether the party's claims are objectively frivolous; and 2) whether the person who signed the pleading should have been aware that they were frivolous." Id. at 1105 (citing Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1988)). Based upon the Court's findings of fact, the Court can easily answer in the affirmative for each of the steps in the Rule 9011 two step inquiry. However, that does not conclude the Court's Rule 9011 analysis. The 1993 amendments to Rule 11 added "a twenty-one day period of 'safe harbor' whereby the offending party can avoid sanctions altogether by withdrawing or correcting the challenged document or position after receiving notice of the allegedly violative conduct. . . . The inclusion of a 'safe harbor' provision [was] expected to reduce Rule 11's volume, formalize appropriate due process considerations of sanctions litigation, and diminish the rule's chilling effect." Ridder v. City of Springfield, 109 F.3d 288, 294 (6th Cir. 1997) (citations omitted).[18]

Rotella failed to follow the absolute procedural requirements of Rule 9011. Rotella's Rule 9011 Sanctions Motion related to frivolous and conflicting allegations contained in four motions filed by Gwynn on behalf of Cole between April 5, 2004 and May 3, 2004. On May 28, 2004, Gwynn in open Court withdrew Cole's Motion for Sanctions. The Court entered the order Withdrawing Cole's Motion for Sanctions on June 15, 2004. Yet as disclosed at the April 21, 2005 hearing, Rotella never sent a Rule 9011 safe harbor communication to Gwynn. Not having sent a Rule 9011 safe harbor communication to Gwynn, Rotella nevertheless filed his Motion for Rule 9011 Sanctions on July 7, 2004 after Gwynn withdrew Cole's Motion for Sanctions. Based upon Rotella's failure to follow the Rule 9011 procedure, the Court denied Rotella's Rule 9011 Sanctions Motion. The Court's Order Denying Rule 9011 Sanctions was entered without prejudice to Rotella refiling under any other appropriate grounds.

Rotella refiled his Rule 9011 Sanctions Motion as a Motion for Sanctions pursuant to 28 U.S.C. § 1927 and 11 U.S.C. §105 on April 21, 2005 directly after the hearing at which it was determined that a Rule 9011 communication had not been sent to Gwynn. The unavailability of Rule 9011 sanctions in this matter does not rule out the possibility of assessing sanctions against Gwynn pursuant to section 1927 and/or pursuant to section 105.[19] Ridder, 109 F.3d at 297. Section 1927 "is concerned only with limiting the abuse of court processes." Roadway Express, 447 U.S. at 762. "Unlike Rule [9011] sanctions, a motion for excess costs and attorneys fees under § 1927 is not predicated upon a 'safe harbor' period, nor is the motion untimely if

made after the final judgment in a case." Ridder, 109 F.3d at 297. "The purpose of §1927 is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs bear them."Boler v. Space Gateway Support Co. LLC, 290 F. Supp.2d 1272,1277 (M.D. Fla. 2003).

While the Court has "considerable discretion in imposing sanctions, it is settled law that an attorney must have notice and an opportunity to be heard on the possibility of being sanctioned, consistent with the mandates of the due process clause of the Constitution." Anjelino v. New York Times Co., 200 F.3d 73, 100 (3d Cir. 2000) (citations omitted). "Due process requires that an attorney be given fair notice that his conduct may warrant sanctions and the reasons why." Mroz, 65 F.3d at 1575 (citing Donaldson v. Clark, 819 F.2d 1551, 1559-60 (11th Cir. 1987). "Notice can come from the party seeking sanctions, from the court, or from both." Id. "The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct-" Carlucci v. Piper Aircraft Corp., Inc., 775 F.2d 1440, 1452 (11th Cir. 1985) (quoting Link v. Wabash R. Co., 370 U.S. 626, 632 (1962)).

The circumstances here show that Gwynn may be taken to have knowledge of the consequences of her conduct. Indeed as a member of the bar, Gwynn had knowledge of the consequences of her conduct. Gwynn's professional responsibilities required her to perform a reasonably thorough investigation of the facts before making unfounded allegations. See e.g. Byrne, 261 F. 3d

at 1115. Rotella's Motion for Sanctions and the numerous other sanctions motions filed in this case provided adequate notice to Gwynn that Rotella was seeking sanctions based upon her reckless and frivolous claims. Gwynn filed written responses to the Motion for Sanctions as well as motions to continue hearings that had been set on the various sanctions motions. The Court's repeated admonitions provided additional notice to Gwynn that sanctions might be imposed as a consequence of her conduct. Having received adequate notice, Gwynn was given ample opportunity to be heard, and in fact was heard, over two days of evidentiary hearings. The Court finds that the mandates of due process have been satisfied.

E. The Amount of Sanctions

The imposition of sanctions is a matter of discretion for the Court. The Court finds that Rotella also contributed to the unreasonable multiplication of proceedings in this case. Rotella's Motion for Sanctions originally sought $99,402.50 for fees and costs allegedly incurred in this matter through March 18, 2005. He now seeks fees and costs in the amount of $241,270.00 through February 8, 2006. Indeed, Rotella has represented to the Court that the fees and costs he incurred are actually several times more than the amount he seeks here. In addition, the Second Amended Discovery Sanctions Motions seeks $57,478.25 and Rotella's sanctions motion for Cole's Motion to Disqualify sought $80,572.50.[20] The amounts sought by Rotella juxtaposed against the estate having received total funds of $56,028.20 through December 31, 2005,[21] compels the Court to ask what has gone wrong? Taken as a whole, the grossly excessive amount of sanctions sought by Rotella shocks this Court's

conscience.

The Court recognizes that many of Gwynn's allegations have been unsubstantiated scurrilous attacks on Rotella. While the Court in no way condones Gwynn's failure to conduct herself professionally as an attorney, Rotella's responses have been disproportionately "over the top". For example, Rotella recently filed a Motion for Sanctions Against Mary Alice Gwynn, Esquire, Pursuant to Bankruptcy Rule 9011, 28 U.S.C. §1927 and 11 U.S.C. §105 and Referral to the Florida Bar for Prohibition from Practicing Before the United States Bankruptcy Court of Florida and for Referral to the Florida Bar (the "Recusal Sanctions Motion")[C.P.1358] seeking sanctions against Gwynn based upon her having filed an Emergency Motion for Recusal of the Honorable Paul J. [sic] Hyman Pursuant to Bankruptcy Rule 5004, 28 U.S. C. §455 and §144 (the "Recusal Motion") . Rotella' s Recusal Sanctions Motion was filed after the Court denied both Gwynn's Recusal Motion and her motion for rehearing of the same. The Court's order denying Rotella's Recusal Sanctions Motion [C.P.#1381) found that Gwynn's Recusal Motion required neither a response nor a Court appearance by Rotella, and that Rotella lacked any basis in law to bring the Recusal Sanctions Motion insofar as it sought sanctions related to Gwynn's Recusal Motion.

Nevertheless, Rotella then filed a twenty-nine page Motion To Rehear, Reconsider and/or Amend Order Denying. . . [the Recusal Sanctions Motion](the "Motion to Rehear") [C.P.1405]. In denying Rotella's Motion to Rehear, the Court found that "not only [wa] s it without merit, but it [wa]s a perfect example of why this has been the most litigious case that has ever come before

this Court." See Order Denying . . .[Motion to Rehear] ("order Denying Rehearing") [C . P . # 14101. The order Denying Rehearing noted that "[m]ore than 1400 docket entries have been made in the three years that this case has dragged on, a pace that rivals most complex chapter 11 cases. However, this is not a complex chapter 11 case, this is an individual chapter 7 case with a small number of parties. The judicial resources expended and the expenses incurred by the litigants in this case is wasteful, unwarranted and a direct result of the acrimony between the parties and their lawyers." Id.

Rotella has been using a sledge hammer to kill a flea. While Gwynn has conducted herself unprofessionally, Rotella's response has been excessive, and at times unnecessary, thereby adding fuel to the hostility. Although a more proportional response would have been appropriate, the Court does not lose sight of the fact that Rotella had no choice but to respond to Gwynn' s reckless attacks on him personally.

Sanctions imposed pursuant to § 1927 "must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the `costs, expenses, and attorneys' fees reasonably incurred because of such conduct.'" Peterson, 124 F.3d at 1396. Rotella shares some fault for the unreasonable multiplication of these proceedings as a consequence of his unmeasured, and at times unnecessary, response to Gwynn. Given Rotella's unmeasured response to Gwynn, it is impossible for the Court to determine which of the excessive line item amounts sought in Rotella's 138 page fee itemization are permissible as an award of sanctions. The excess proceedings that the court finds relevant to Rotella's

Motion for Sanctions were held on May 28, 2004, May 20, 2005, June 16, 2005,and February 16,2006. Various other matters were heard by the Court on those days,[22] such that it is difficult for the Court to determine the costs associated with the exact portion of the hearings that may properly be assessed as a sanction for the excess proceedings necessitated by Gwynn's unreasonable and vexatious conduct. However, had Rotella made a more measured response, the Court's best estimate for the reasonable amount of the excess costs, expenses, and attorney's fees incurred because of Gwynn having unreasonably and vexatiously multiplied the proceedings would be 40.0 hours at $350 per hour for a total award of $14,000.00 as explained below. The amounts sought by Rotella above and beyond $14,000.00 are grossly excessive and unwarranted.

In calculating an award of attorneys' fees the Eleventh Circuit explains that "the starting point in any determination for an objective estimate of the value of a lawyer's services is to multiply hours reasonably expended by a reasonable hourly rate." Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 19837). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman, 836 F.2d at 1299 (citing 13lum v. Stenson, 465 U.S. 886, 895-96 (1984)). Based upon the Court's experience in reviewing numerous fee applications in bankruptcy proceedings, the Court finds that the hourly rate of $350.00 for Rotella's work is reasonable and in line with the hourly rates charged by attorneys of his skill and experience in the Southern District of Florida.

The Court estimates that a proportional response by Rotella to Gwynn would have required the following time:

10.0 hrs	Preparation for the initial May 28, 2004 hearing at which Gwynn, without notice to Rotella, withdrew Cole's Motion for Sanctions
1.0 hrs	Appearance by Rotella at May 28, 2004 hearing
4.5 hrs	Preparation of Rotella's Rule 901.1 Sanctions Motion (C.P. 266), which was subsequently filed as Rotella's Motion for Sanctions pursuant to 28 U.S.C. §1927 and 11 U.S.C. § 105 (C.P. 839)
6.0 hrs	Preparation for May 20, 2005 hearing
3.0 hrs	Appearance by Rotella at May 20, 2005 hearing
4.0 hrs	Preparation for June 16, 2006 hearing
6.0 hrs	Appearance by Rotella at June 16, 2005 hearing
2.0 hrs	Preparation for February 16, 2006 hearing
1.5 hrs	Appearance by Rotella at February 16, 2006 hearing
2.0 hrs	General administrative matters and communication with opposing counsel.
40.00 hrs	Total hours @ $350 = $14,000.00

The Court finds that an award in the amount of $14,000.00 is reasonable and appropriate pursuant to 28 U.S.C. § 1927 for the excess proceedings necessitated by Gwynn's unreasonable and vexatious conduct. The Court also finds that imposition of sanctions against

Gwynn in the amount of $14,000.00 is appropriate pursuant to 11 U.S.C. § 105 and the Court's inherent power "to manage its affairs which necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." Carlucci, 775 F.2d at 1447(citations omitted).

III. Gwynn's Sanction Motion and Gwynn's Transfer Motion

Gwynn's "Emergency" Sanction Motion [C.P.# 1393] filed on March 15, 2006 states that the nature of the emergency is that "Gary J. Rotella, Esquire, Debtor's counsel, by letters dated February 9, 2006, and March 8, 2006, has threatened or intends to file 'Motions for Sanctions', 'Referrals to the Florida Bar for Prohibition [from practicing before the) Bankruptcy Court for the Southern District of Florida' and 'Referrals to the Florida Bar' . . . " . [23] As a preliminary matter, emergency motions should be filed only for those matters where the requested relief requires immediate action to prevent harm. Gwynn has failed to explain how Rotella's intention to file a motion constitutes an emergency matter requiring immediate relief. Gwynn also filed an "Emergency" Transfer Motion, seeking transfer of Gwynn's Sanction Motion to District Court. The Transfer Motion similarly fails to meet the test for an emergency.

Having determined that neither "emergency" motion should have been filed on an emergency basis, the Court will attempt to address the substance of Gwynn's Sanction Motion. As a matter of law, the Court finds that Rotella's Rule 9011 safe harbor letters dated February 9, 2006 and March 8, 2006, are not grounds for

sanctions pursuant to section 1927. Although Gwynn states that the letters contain unwarranted threats and are intimidating, they are an insufficient basis for an award of sanctions. Gwynn further defends her having filed on March 2, 2006, a Supplemental Response to Rotella's Sworn Testimonial [24]("Supplemental Response") stating that it "cannot" be frivolous or vexatious and it does not warrant Rotella's Rule 9011 warning. The Court notes that Rotella's Sworn Declaration (Rotella's Exhibit "AA") was offered, but not accepted into evidence at the February 16, 2006 hearing. If Gwynn had participated in that hearing instead of leaving, or if she had carefully read the transcript of that hearing which she caused to be filed, she would have known that the Sworn Declaration is not part of the record. Nevertheless, Gwynn needlessly filed a Supplemental Response to Rotella's Sworn Declaration which the Court did not consider. The Court thus finds that none of Gwynn's assertions relating to Rotella's safe harbor letters warrant sanctions.

At this point Gwynn's Sanction Motion improperly raises issues that were previously determined and/or alleges impropriety in proceedings before other tribunals. Gwynn alleges that at Rotella' s 2004 Examination conducted nearly two years ago, Rotella perjured himself regarding his alleged pre-petition representation of the Debtor. Gwynn's Exhibit "1" was admitted into evidence at the April 17, 2006 hearing. Exhibit "1" is a letter dated February 23, 2006 by Barry G. Roderman, Esquire ("Roderman") to The Florida Bar referencing a complaint by Carl Shuhi. Roderman, under subpoena, appeared and testified at the April 17, 2006 hearing. He testified that his letter contained

errors and was incorrect insofar as it stated "my recollection is that Gary Rotella had represented James Walker sometime in the past prior to the time that I was initially retained in connection with a revocation of probation hearing in the early 90's". Roderman testified that he had no factual basis for having made that statement in his letter and it was in fact incorrect.

Gwynn also states that her allegations regarding Rotella's alleged perjury are explained in her Supplemental Response. Since the Court did not admit Rotella's Sworn Declaration, it will not consider Gwynn's Supplemental Response thereto. The Court notes however, that if Rotella's Sworn Declaration had been admitted at the February 16, 2006 hearing, Gwynn's Supplemental Response filed on March 2, 2006, would have been untimely filed. Nevertheless, it appears Gwynn's allegations regarding Rotella's alleged perjury is an impermissible attempt to renew Cole's Motion to Disqualify. Cole's Motion to Disqualify and Cole's Supplemental Memorandum in Support of Cole's Motion to Disqualify [C.P.311] resulted in the Court imposing sanctions against Gwynn. Although the District Court Order vacated the Court's Order Awarding 9011 Sanctions, the Court reaffirms its findings of fact. Specifically, Cole had no standing to raise the issues in the Motion to Disqualify or in the Supplemental Memorandum thereto. The Court also reaffirms its finding that Gwynn had no legal basis upon which to file Cole's Motion to Disqualify, or Cole's Supplemental Memorandum in Support of Cole's Motion to Disqualify. Order Awarding Sanctions (June 15, 2004) Par. 4.

Gwynn also alleges in Gwynn's Sanction Motion that

Rotella lied regarding settlement discussions, an allegation which she indicates is more fully explained in her Supplemental Response. Any settlement discussions the parties might have engaged in are irrelevant to the issues before the Court. In addition as discussed above, the Court does not consider Gwynn's untimely and unnecessary Supplemental Response as a basis upon which to award sanctions.

Gwynn alleges in Gwynn's Sanction Motion that Rotella lied to the Eleventh Circuit concerning Jay Farrow's April 19,2005 letter of resignation from Rotella P.A. Gwynn alleges that Farrow's appearances before this Court, the District Court, and the Eleventh Circuit subsequent to his resignation from Rotella P.A., are evidence that Rotella lied to the Eleventh Circuit during oral argument in that tribunal. The Court does not agree that a former associate's appearance in court on behalf of his former employer evidences that the employer lied about the status of the associate's employment. Nevertheless, Gwynn's allegation that Rotella lied to the Eleventh Circuit is a matter for the Eleventh Circuit.

Gwynn alleges in Gwynn's Sanction Motion that Rotella made intentional misrepresentations to the District Court by representing that this Court had ruled on Gwynn's Response to Debtor's Renewed Motion to Reopen Evidence Pursuant to Bankruptcy Rule 9023 and Fed. R. Civ. P. 59(a) and the Undersigned Request for a Hearing on the Undersigned's Motion for Sanctions Against Gary J. Rotella, Esq. [C.P. 244]. Gwynn's allegation that Rotella made misrepresentations to the District Court is a matter for the District Court. However, to the extent that Gwynn

maintains she is entitled to sanctions against Rotella based upon the Court's April 12,2004, order Reserving Ruling on Mary Alice Gwynn's Request for Sanctions and Attorney's Fees against Gary H. Rotella, Esq. [C.P.275], the Court declines to exercise that reservation of jurisdiction to award sanctions to Gwynn.

Gwynn alleged in Gwynn's Sanction Motion that "Rotella, with the assistance of his associate, Jay Farrow, had an underlying agenda to sabotage and remove the Creditor-elected Trustee [Linda Walden], as she was on the verge of filing an adversary action to disclose all of the Debtor's additional assets." Gwynn's Sanction Motion Par. 33. This Court's removal for cause of Linda Walden as trustee has been affirmed by the District Court and is now under appeal to the Eleventh Circuit. Gwynn may not relitigate Linda Walden's removal as trustee in Gwynn's Sanction Motion.

It is astonishing to the Court that given the Court's April 8, 2005, order Granting Debtor's Emergency Motion to Strike Gwynn' s Motion to Clarify the Record for Fraud upon the Court; Motion to Preclude and Prohibit Mary Alice Gwynn, Esquire from Filing Pleadings on Behalf of Parties Represented by Other Counsel; and Denying Motion for Immediate Referral to the Florida Bar Without Prejudice With Reservation of Jurisdiction (the "April 8, 2005 order")(emphasis added) [C.P. 800], that Gwynn's prayer for relief at paragraph D requests sanctions for the damages Rotella "caused to the Creditor's Counsel, Creditor-elected Trustee, Walden, and all the other parties to this matter." The Court's April 8, 2005 Order found that Gwynn had no standing to file her Motion to Clarify the

Record and supplement thereto, since she did not represent the parties on behalf of whom she filed the motion. Gwynn was ordered not to file any further pleadings on behalf of parties that she did not represent. Nevertheless in violation of the Court's April 8, 2005 order, Gwynn has now filed Gwynn' s Motion for Sanctions seeking relief for damages caused to the creditors, creditors' counsel, and former trustee Linda Walden, none of whom she currently represents. For the reasons stated above, the Court denies Gwynn's Sanction Motion finding that it is wholly without merit.

As to Gwynn's Transfer Motion, the Court notes that Gwynn has demonstrated a pattern of bringing matters before the wrong court. As detailed above, Gwynn failed to raise her concerns about proceedings in State Court before the State Court. Instead, she raised her concerns about the State Court proceedings with this Court ten months later in Cole's Motion for Sanctions. Gwynn recently brought substantially similar motions before two different courts simultaneously. On March 16, 2006, Gwynn filed a motion to withdraw the reference in this Court. On the same day she filed a similar motion in District Court. The District Court's order denying her motion to withdraw the reference noted her failure to follow local procedural rules by filing her motion in the District Court.[25] Gwynn' s motion to withdraw the reference which was filed with this Court has been transmitted to the District Court. It seeks the same relief as Gwynn' s Transfer Motion. Therefore, the Court will deny as moot Gwynn's Transfer Motion.

IV. Gwynn's Conduct Before This Court Warrants

Referral to The Florida Bar

Gwynn's conduct before this Court has been unprofessional. Her pleadings are confused and often difficult to understand. She files pleadings in the wrong court and has filed the same motion in different courts at the same time. As recently as the hearing on Gwynn's Sanction Motion held April 17, 2006, Gwynn improperly attempted to relitigate matters that have already been determined. She has made scurrilous allegations that lack any basis in fact or in law without having conducted any investigation. She has also made allegations that demonstrate her failure to examine or understand the Local Rules, or the Federal Rules of Bankruptcy Procedure. Gwynn's testimony at the Sanctions Hearing was at times disjointed, confusing, unresponsive, and incoherent. She has provided no credible testimony or evidence to support most of her allegations. She has admitted conducting research on the substance of her allegations after having filed her pleading. Her allegations between pleadings were inconsistent and contradictory. Lately every motion Gwynn files in this case has been designated as an "Emergency Motion," when there exist no exigent circumstances requiring immediate relief. Gwynn has routinely made accusations and allegations for which there was no evidentiary support, she has walked out of hearings, and she has repeatedly demonstrated her lack of understanding of the law. The Court concludes that Gwynn has engaged in unprofessional conduct before this Court.

The Code of Conduct for United States Judges, Canon 3(B)(3) states that, "A judge should initiate appropriate action when the judge becomes aware of reliable

evidence indicating the likelihood of unprofessional conduct by a judge or lawyer." The commentary to Canon 3(B)(3) states that, "Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authorities." Therefore, the Court is providing a copy of this Order to the Florida Bar for investigation of Gwynn's unprofessional conduct as an attorney before this Court throughout this proceeding.

V. The Over-Litigation of This Case

The Court finds that both Gwynn and Rotella share responsibility for unnecessarily turning this seemingly straight forward chapter 7 case into a case of massive proportions. Gwynn and Rotella share fault for this case having taken an absurd and wasteful course. The Court finds that Rotella has used poor judgment as evidenced by his unmeasured response to Gwynn. Both Gwynn and Rotella have improperly over-litigated this case and in so doing they have demonstrated their complete disregard for this Court's time and resources. There remain no core issues to determine in this case. The only pending matters in this case are sanctions cross-motions between the various parties. This case should have been concluded long ago.

CONCLUSION

For the reasons stated above, the Court grants Rotella's Motions for Sanctions but denies both Rotella's Second Amended Discovery Sanctions Motion and Gwynn's Sanction Motion.

ORDER

Having carefully reviewed the applicable law, the District Court Order, the Second Amended Discovery Sanctions Motion, Rotella's Motion for Sanctions, Gwynn's Sanction Motion, Gwynn's Transfer Motion, the conduct of Rotella and Gwynn during this proceeding and being otherwise fully advised in the premises, the Court hereby ORDERS AND ADJUDGES:

1. The Second Amended Discovery Sanctions Motion is DENIED.
2. The Amended Order designated as Court Paper No. 1217 is VACATED.
3. Rotella's Motion for Sanctions is GRANTED. Gwynn shall pay Rotella fourteen thousand dollars ($14,000.00) as sanctions.
4. Gwynn's Sanction Motion is DENIED.
5. Gwynn's Transfer Motion is DENIED AS MOOT.

Footnotes

[1]The Court received and admitted into evidence Gary J. Rotella, P.A. and Rotella Is, Exhibits "All through "T" at the February 16, 2006 hearing. Exhibit "AA" was not admitted into evidence.

[2]In addition to striking Cole's claim and entering Final Default Judgment against Cole for $57,478.25, the Cole Default Order entered Final Default Judgment against Cole for $80,572.50, the amount sought in Rotella's Rule 9011 Sanctions Motion [C.P.360] and for $99,402.50, the amount sought in Rotella's Motion for Sanctions [C.P.463].

[3]The Eleventh Circuit has ruled that, "A motion for sanctions under Rule 37, even one which names only a party, places both that party and its attorney on notice that the court may assess sanctions against either or both unless they provide the court with a substantial justification for their conduct" Devaney v. Continental American Ins. Co., 989 F.2d 1154, 1160 (11th Cir. 1993); Stuart I. Levin & Assoc. PA, v. Rogers, 156 F.3d 1135, 1142 (11th Cir. 1998). Notwithstanding these precedents, the Court acquiesced to Gwynn's claim that she believed the Amended Discovery Sanctions Motion was brought solely against Cole.

[4]Exhibit "M" subsection "C", admitted into evidence at the February 16, 2006 hearing, was also admitted as Rotella's Exhibit "H" at the Sanctions Hearing.

[5]At the conclusion of the June 15, 2005 hearing, the Court stated that if it granted the Motion for Sanctions, it would conduct a separate hearing on the amount.

[6]The hearing on Rotella's Motion for Sanctions and on the Second Amended Discovery Sanctions Motion had been set for 9:30 A.M., January 27, 2006. On January 26, 2006 at 3:10 P.M., Gwynn filed an Emergency Motion to Continue Hearing. The Court granted her motion and continued the hearing until February 16, 2006, a date that was acceptable to Gwynn.

[7]Bankruptcy Rule 9011 is inapplicable to discovery disclosures and requests. See B.R. 9011 (d). 28 U.S.C. §1927 in also inappropriate here because it only permits sanctions against attorneys, not parties. See e.g., Byrne v. Nezhat, 261 F.3d 1075, 1106 (11th Cir. 2001). Cole's culpability in this matter has already been determined. See Cole Default Order.

[8]"Invocation of the Court's inherent powers requires a finding of bad faith" In re Mroz, 32 F.3d at 1575 (citing Chambers, 501.U.S. at 49). There has been no evidence

presented that Gwynn acted in bad faith with respect to the discovery matters at issue.

[9]The Amended Order used a less stringent objective standard which would have been acceptable in some circuits. See e.g. Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223 (7th Cir.1984); In re Ruben, 825 F.2d 977 (6th Cir.1987); Jones v. Continental Corp., 789 F. 2d 1225 (6th Cir.1986); Lewis v. Brown & Root, Inc., 711 F. 2d 1287 (5th Cir.1983); see also Cruz v. Savage, 896 F. 2d 626, 631-32 (1st Cir.1990) ("Behavior is 'vexatious' when it is harassing or annoying, regardless of whether it is intended to be so....It is enough that an attorney acts in disregard of whether his conduct constitutes harassment or vexation, thus displaying a 'serious and studied disregard for the orderly process of justice.'").

[10]In Hardy, a chapter 13 debtor sought sanctions based upon the Internal Revenue Service's willful, rather than bad faith violation of the discharge injunction. Id.

[11]The Courtesy Inns line of cases dealt with the issue of whether or not bankruptcy courts are "courts of the United States" capable of exercising the inherent and statutory powers reserved to Article III courts. Courtesy Inns determined that bankruptcy courts are not "courts of the United States" and therefore do not have authority to impose section 1927 sanctions. Volpert, 110 F.3d at 501. Rainbow Magazine determined that section 105 imbues bankruptcy courts with powers similar to an Article III court's inherent powers. Id. Volpert sidestepped the issue by finding that 11 U.S.C. § 105 provided an alternative basis to 28 U.S.C. § 1927 for awarding sanctions for bad faith filings. Id.

This Court agrees with the cases that find that bankruptcy courts are "units" of the district court and have jurisdiction to award sanctions under 28 U.S.G. §

1927 "due to [their] jurisdictional relationship with the district court". In re Lawrence, 2000 WL 33950028 *4 (Bankr. S.D. Fla. 2000) accord Huff v. Brooks (In re Brooks), 175 B.R. 409, 412 (Bankr. S.D. Ala. 1994) ; see also Grewe v. United States (I'n re Grewe), 4 F.3d 299 (4th Cir. 1996) (concluding Congress intended bankruptcy courts to qualify as courts of the United States).

[12]The Receivership Proceeding is the case styled Eleanor C. Cole v. James F. Walker, In The Circuit Court of The 17th Judicial Circuit, In And For Broward County, Florida, Case Number 89-21462 (09).

[13]The Court's Order Denying Motion For All Remedies at paragraph 2 found that: [t]he existence of the Guarantee was disclosed to the office of the United States Trustee on August 14, 2003. However Rotella did not file the Notice of Filing [Amended Disclosure of Compensation and Second Amended Disclosure of Compensation] which referenced the Guarantee, with the Court until May 28, 2004. while the Notice of Filing Disclosures of Compensation was not filed with the Court until May 28, 2004, the parties in interest had notice of the existence of the Guarantee as early as September of 2003."

[14]Rule 9013-1(C) of the Local Rules of the United States Bankruptcy Court for the Southern District of Florida allows a variety of motions to be considered without a hearing ("ex parte motions). Subsection (2) of Rule 9013-1(C) provides

> Motions to extend the time for filing schedules, statements, or lists, where the requested extended deadline is not later than 5 days before the § 341 meeting or post-conversion meeting. The motion must be served on the debtor, the

trustee, the U.S. trustee, and all parties who have requested notices. . .

[15]Gwynn made substantially similar allegations in Paragraph 9 of Cole's Supplemental Motion for Sanctions.

[16]A restitution hearing was held on July 3, 2003 in the matter styled State of Florida v. James F. Walker, In the Seventeenth Judicial Circuit, In and For Broward County, Florida, Case Number: 90-20599 CF10A.

[17]Bankruptcy Rule 9011 is substantially similar to Fed. R. Civ. P. 11 and the case law interpreting Fed.R.Civ.P. 11 is often used in applying Rule 9011. See, e.g., 1n re Mroz, 65 F.3d at 1572.

[18]Ridder further states, "Undoubtedly, the drafters also anticipated that civility among attorneys and between bench and bar would be furthered by having attorneys communicate with each other with an eye toward potentially resolving their differences prior to court involvement." Ridder, 109 F.3d at 294. Unfortunately, the drafters, anticipation has not been realized in this case.

[19]Rotella's original Rule 9011 Sanctions Motion sought sanctions pursuant to both Rule 9011 and 11 U.S.C. §105.

[20]In the District Court order vacating the Court's Order Awarding Rule 9011 Sanctions, Judge Gold stated that had he considered the issue he would have concluded that the award of $80,572.50 was as an abuse of discretion.

[21]As reported by Chapter 7 Trustee Patricia Dzikowski on the December 31, 2005, Individual Estate Property Record and Report filed with the United States Trustee.

22 The following matters were noticed for hearing on

the respective hearing
dates:
May 28, A2004
1) Renewed Motion to Disqualify Rotella PA from Representing Debtor(C.P. 361); 2)Cole's Motion for Sanctions Against Rotella Pursuant to Court's Order Entered on 7/17/03 (C.P. 266); 3)Debtor's Motion for Attorneys' Fee and Costs Against Eleanor Cole (C.P. 255); 4)Cole's Supplement to Motion for Sanctions Against Rotella Pursuant to Court's Order Entered on 7/17/03 (C.P. 273); 5) order Reserving Ruling on Gwynn's Request for Sanctions and Attorneys' Fees Against Rotella (C.P. 275) ; 6) Cole's Motion for Protective Order (C.P. 237); 7)Debtor's Motion for Finding of Contempt and for Entry of Sanctions Against Gwynn (C.P.195); 8) Debtor's Motion for Sanctions Against Gwynn and Cole Pursuant to Rule 9011 (C.P. 360);9) Debtor's Motion for Relief from order and to Conform Order to Court's Ruling (C.P. 72); and 10)Motion for Protective Order (C.P. 371).
May 20, 2005
1) Cole's Motion for Rehearing (C.P. 864); 2) Creditor Shuhi Motion for Rehearing Court Order Dated 4/19/05 (C.P. 863); 3)Debtor's Amended Motion for Attorneys' Fees and Costs Against Cole (C.P. 838); 4) Gwynn's Motion to Strike and/or Vacate Order Granting Debtor's Emergency Motion to Strike Gwynn's Motion to Clarify Record for Fraud Upon the Court...(C.P.825); 5)Gwynn's Motion to Strike and /or Vacate Order Granting Debtor's Emergency Motion to Preclude Gwynn from ReRepresenting Shuhi and Florida Precision Calipers, Inc. . . (C. P. 827); 6)Rotella's Motion for Sanctions (C.P. 839); 7) Cole's Motion for Rehearing (C.P. 856); and 8)Motion to Quash filed by Carol Ann Walker (C.P. 894).

June 16,2005 (Continuation of all matters from May 20, 2005)

1) Cole' s Motion f or Rehearing (C.P. 864); 2) Creditor Shuhi Motion for Rehearing Court Order Dated 4/19/05 (C.P. 863); 3)Debtor's Amended Motion for Attorneys' Fees and Costs against Cole (C.P. 838); 4) Gwynn' s Motion to Strike and/or Vacate Order Granting Debtor's Emergency Motion to Strike Gwynn's Motion to Clarify Record for Fraud Upon the Court ...(C.P.825); 5)Gwynn's Motion to Strike and/or Vacate Order Granting Debtor's Emergency Motion to Preclude Gwynn from ReRepresenting Shuhi and Florida Precision Calipers, Inc ...(C.P. 827); 6)Rotella's Motion for Sanctions (C.P.839); 7) Cole's Motion for Rehearing (C.P.856); 8}Motion to Quash filed by Carol Ann Walker (C.P. 894): 9) Gwynn's Motion to Extend Time to File Designation of Items (C.P. 923); 10)Gwynn's Motion to Consolidate Appeals (C.P. 922); 11)Motion to Set Aside Court's Order Removing Chapter 7 Trustee (C.P. 943); 12)Lundborg's Motion to Continue (C.P.944); and 13)Emergency Motion By Francis L Carter, Gary M Murphree To Quash Subpoenas Served by Gwynn, Upon Francis L. Carter, Esq. and Gary M. Murphree, Esq (C.P. 892).

[23]On February 27, 2046, Rotella filed a Motion for Sanctions Against Mary Alice Gwynn, Esquire, Pursuant to Bankruptcy Rule 9011, 28 U.S.C. 91927 and 11 U.S.C. §105 and Referral to the Florida Bar for Prohibition from Practicing Before the United States Bankruptcy Court of Florida and for Referral to the Florida Bar, (C.P.1358) which the Court denied in an order dated March 10, 2006.

[24]Gwynn's Supplemental Response to Rotella's Sworn Testimonial [C.P.1369] references her original Response [C.P. 1326] which in turn references the

"Sworn Testimonial of Gary J. Rotella, Esquire and the Sworn Declaration of Gary J. Rotella." Rotella filed a Sworn Testimonial [C.P. 1282] on January 25, 2006 and a Notice of Filing a Sworn Declaration [C.P. 1311] on February 8, 2006.Although unclear, it is immaterial whether Gwynn's Supplemental Response responds to Rotella's Sworn Declaration or Rotella's Sworn Testimonial because neither document was considered by the Court.

[25]The District Court also stated that Gwynn's motion was unclear. It further noted that "[a]ccording to the caption of the Instant Motion, [Gwynn] seeks relief pursuant to 28 U.S.C.§ 157(d) and Rule 87.3 of the Federal Rules of Civil Procedure. There is no such Federal Rule of Civil Procedure." The District Court inferred that Gwynn intended to seek relief pursuant to Rule 87.3 of the Local Rules of the United Stated District Court for the Southern District of Florida.

No. 07-14049 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: JAMES F. WALKER, Debtor.
MARY ALICE GWYNN, Plaintiff-Appellant Cross-Appellee,
versus
JAMES F. WALKER, Defendant-Appellee Cross-Appellant.

August 28, 2008, Filed

Appeals from the United States District Court for the Southern District of Florida. D. C. Docket No. 07-80121-CV-ASG. BKCY No. 03-32158-BKC-PGH.

JUDGES: Before DUBINA, BLACK and PRYOR, Circuit Judges.

PER CURIAM :

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bans (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Bane are DENIED.

115

(2)

No.

IN THE

Supreme Court of the United States

MARY ALICE GWYNN, PETITIONER

v.

JAMES F. WALKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-80655-CIV-GOLD/TORRES

MARY ALICE GWYNNE, ESQUIRE,
Appellant/Cross-Appellee,
v.
JAMES F. WALKER and GARY J. ROTELLA, ESQUIRE,
Appellees/Cross-Appellants.

OMNIBUS ORDER; AFFIRMING ALL BANKRUPTCY COURT ORDERS ON APPEAL AND CROSS-APPEAL AND CLOSING CASE

THIS CAUSE is before the Court on Appellant's appeal and Appellees/Cross-Appellants' cross-appeal of final Orders of Bankruptcy Court. Also pending are Appellant's "Motion to Supplement the Designation of Record on Appeal to Include Record Items from Dismissed Appeals Case No.: 06-80731 CIV-GOLD/TORRES, and Case No.: 08-80804 CIV-GOLD/TORRES" [DE # 15] and Appellees/Cross-Appellants' "Response to Appellant, Mary Alice Gwynn's Motion to Extend Allowed Pages of Initial Brief, Pursuant to Local Rule 87.4(E)(2) [D.E. 14]; Motion to Strike Appellant's Initial Brief for Intentional Misrepresentations to the Court; and, Motion for Sanctions Pursuant to this Court's Order Placing Parties on Notice That Court May Invoke Federal Rule of Civil Procedure 11 (D.E. 12]" [DE # 23].

I. Which Orders are being Appealed by Appellant?

The first matter is to identify which specific Orders are the subject of this appeal and cross appeal. On August 22, 2006, I issued an Order to Show Cause requiring the Appellant to explain how the Orders being appealed were final and appealable orders pursuant to 28 U.S.C. § 158 [DE # 7].

In her Response to this Court's Order to Show Cause, Appellant stated:

> [t]he Appellant is presently appealing the Court's order cited as #3 of Memorandum Order, titled Gary J. Rotella, Esq.'s Motion for Sanctions Against Mary Alice Gwynn, Esq. Pursmant to 28 U.S.C. § 1927 and 11 U.S.C. § 105 Relating to Creditor Eleanor Cole's Motion for Sanctions Against Gary J. Rotella, Esq., Pursuant to the Court Order Dated July 17, 2003 [C.P. 839]. All other orders contained in the Memorandum Order, including #1,2,4 and 5, are not being appealed. (emphasis and punctuation omitted from original). (Appellant's Response to this Court's Order to Show Cause Order, 2)

In her Response to this Court's August 22. 2006 Order to Show Cause, Appellant also conceded that all other Orders previously being appealed were non-final Orders.

On September 15, 2006, Appellant filed her Initial Brief [DE # 17]. In the Initial Brief, Appellant raises a number of legal issues related to the Bankruptcy Court's decision to deny her motion to recuse the Bankruptcy Court judge pursuant to 28 U.S.C.§ 144 and 255. On September 18, 2006, Appellant filed a "Motion

to Supplement the Designation of Record of Appeal to Include Record Items from Dismissed Appeals Case No.: 06-80731 CIV-GOLD/TORRES, and Case No.:06-80804 CIV-GOLD/TORRES." [DE # 16]. In this Motion, Appellant seeks to include a number of items related to the Bankruptcy Court's imposition of sanctions into the record on appeal.

On October 4, 2006, Appellees/Cross-Appellants filed a "Motion to Strike Appellant's Initial Brief for Intentional Misrepresentations to the Court; and. Motions for Sanctions, Pursuant to this Court's Order Placing Parties on Notice that Court May Invoke Federal Rule of Civil Procedure 11 [D.E.12]"[DE # 23]. In Appellees/Cross-Appellants' Motion, Appellees/Cross-Appellants seek to strike all or portions of Appellant's Initial Brief because Appellant "never alerted this Court that any Order, except for one (1) particular Order, was at issue in the instant Appeal." (Appellees' Motion to Strike, 5). Having reviewed the record, I conclude that these matters should be resolved prior to addressing the merits of the appeal.

Federal Rule of Bankruptcy Rule 8006 states:

> Within 10 days after filing the notice of appeal as provided by Rule 8001 (a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the

> appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

While some Circuit Courts strictly construe Bankruptcy Rule 8006, the Eleventh Circuit, however, applies a more flexible rule: "An issue that is not listed pursuant to (Rule 8006] and is not inferable from the issues that are listed is deemed waived and will not be

considered on appeal" (emphasis added). Snap-On Tools, Inc. v. Freeman (In re Freeman), 956 F2d 252,255 (11th Cir. 19992). Thus, as long as an issue is inferable, Rule 8006 "is not intended to bind either party to the appeal as to the issues that are to be presented." In re Cohoes Indus. Terminal, Inc., 90 B.R. 67, 70 (S.D.N.Y. 1988)(internal quotation marks omitted).

In determining if an issue on appeal is inferable from the original pleadings or Notice of Appeal, Judge Lawson of the Middle District of Georgia stated:

> The Eleventh Circuit has not set forth a test for determining when an issue is inferable. Therefore, adopting a mix of approaches from other courts, this Court holds that an issue not listed in a Rule 8006 Issue Statement is inferable under the following circumstances. First, the issue must have been raised in the bankruptcy court because an appellate court generally will not consider issues not adjudicated below. Harrison v. Brent Towing Co., Inc. (In re H& R Transp. Co., Inc.), 110 B. R 827, 830 (M.D.Tenn. 1980)(citing Singleton v. Wulf, 428 U.S. 106, 121). Second, and in conjunction with the previous point, the issue must not require the court to make any independent factual findings. In re H & R Transp. Co., 110 B. R. at 830. Third, the issue must present no surprise to the other litigant. See Turner v. Marshack (In re Turner) 186 B.R. 108 (9th Cir. BAP 1995). 1995). (internal citation omitted).

In re Bracewell, 322 B.R. 698, 701-02 (M.D. Ga. 2005). In evaluating the current Motions, I will employ a similar test.

In their Motion to Strike, Appellees/Cross-Appellants state:

> If the Court makes even a cursory examination of Appellant's Initial Brief, it will find that Appellant's Initial Brief is filled with substantial amounts of irrelevant and immaterial discussions and arguments, including several pages of totally improper comments and discussions as to Bankruptcy Court's character, why he allegedly should have been disqualified from the Walker Case, his alleged pervasive bias towards Gwynn in favor of undersigned, his referral of the subject Memorandum Order to The Florida Bar requesting an investigation regarding same as to Gwynn, her discussion of other allegeable misconducts exhibited by Bankruptcy Court evidencing deep seated bias against Gwynn, in favor of undersigned.

(Appellees' Motion to Strike, 9). Moreover, Appellees/Cross-Appellants argue:

> Based upon Gwynn's sense of general dishonesty with this Court and her many misrepresentation to this Court in connection with the instant Appeal; given Gwynn's dogged determination to include matters in the instant Appeal that have no place here, despite herprior representations to this Court that such matters were not a part of this Appeal; and, Gwynn's various other

> violations of Rules of Civil Procedure, Appellate Rules, Local Rules, there is only one (1) appropriate remedy for this Court to impose. Respectfully, this Court should strike Appellant's Initial Brief filed by Gwynn pursuant to its authority under Rule 11, Fed.R.Civ.P. and all other applicable Statutes and Rules and enter an award of sanctions for attorneys' fees and costs against Gwynn.

(Appellees' Motion to Strike, 16-17). In Response to Appellees/Cross-Appellants' Motion for Strike and Sanctions, Appellant argues:

> 3. In an effort to preserve all her appellate rights, Appellant had initially filed three (3) appeals. In her Reeponse(s) to this Court's Order(s) to Show Cause (1-Case No.: 06-80804, 2-Case No: 06-80731, and 3-Case No: 0680655 (the instant appeal)) the Appellant agreed with this Court and attempted to Simplot by by dismissing Appeals #06-80804 and #06-80731, and clarifying the remaining orders/issues on appeal under Case No. 06-80655.
>
> 4. In both her Response to Court's Order to Show Cause Dated September 5, 2006 and Voluntary Dismissal of Appeal filed in Case #06-80804, and her Response toCourt's Order to Show Cause Dated September 5, 2006 and Voluntary Dismissal of Appeal filed in Case #06-80804, space and her Response to Court's Order to Show Cause Dated September 5, space 2006 and Voluntary Dismissal of Appeal filed in Case #06-80731, the Appellant relied on and decided

> the Corrugated Container... (supra) case, which holds that "disqualification questions are fully reviewable on appeal from a final judgment." (See attach Exhibit #1 and two respectively) Mr. Rotella was served copies of both of these pleading upon filing.
>
> 5. Appellant also amended her Statement of Issues on Appeal and her Designation of Record Items to include the Bankruptcy Court's denial of her Motion for Recusal. (Original punctuation emphasis omitted).

Appellant's Initial Brief does not seek to appeal a single Order as she previously represented in her Response to this Court's August 22, 2006 Order to Show Cause. Rather, Appellant seeks to now challenge eight Orders of the Bankruptcy Court. A number of the Orders that Appellant seeks to appeal center on "[w]hether the Bankruptcy Court erred in denying Appellant's motion for recusal pursuant to 28 U.S.C. Sec. 144, Sec 455 and 5004." Because Appellant never has requested leave of Court to file her Amended Statement of Issues, I decline to consider the legal issues raised in her Initial Brief, unless those issues are inferable from the original issue presented in her Notice of Appeal. While Appellees/Cross-Appellants are correct that Appellant previously stated that she was only appealing one order, I nonetheless will consider those issues raised in the Appellant's Initial Brief relating to the Bankruptcy Judge's recusal (and certain other issues raised in the Appellant's Initial Brief) because those issues are inferable from the Appellant's previous filings and her Notice of Appeal. In reaching this conclusion, I place significant emphasis on the 11th Circuit's interpretation

of Bankruptcy Rule 8006 Snap-On Tools, Inc. v. Freeman (In re Freeman), 956 F. 2d 252, 255 (11th Cir. 1992) (holding that an issue that is not listed pursuant to Federal Rule of Bankruptcy Procedure 8006 and is not inferable from issues that are listed is deemed waived and will not be considered on appeal.)

Also, I base my decision on a number of other factors. First, the Bankruptcy Court fully adjudicated recusal issue. Second, the Appellees were not taken by surprise by the recusal issue because this legal issue was fully litigated in the Bankruptcy Court. Third, the consolidation of all legal issues in a single appeal in this matter aids judicial efficiency and avoids piece-meal litigation. Forth, since legal issues raised by Appellants centering on Bankruptcy Court judge's recusal are legal issues which are reviewed on a de novo basis by this Court, no further briefing by the parties is necessary.

To the extent that Appellees' Motion seek to strike portions of the Appellant's Initial Reef, Appellees' requested is DENIED. Furthermore, a review of the items Appellant seeks to include in this record via her "Motion to Supplement the designation of Record on Appeal to Include Record Items from Dismissed Appeals Case No.:06-80731 CIV-GOLD/TORRES, and Case No.: 06 – 80804 CIV-GOLD/TORRES" [DE # 15] is GRANTED. Because, I conclude that the Orders related to the Bankruptcy Court's disqualification in/or recusal are properly before this court on appeal, I conclude that the sanctions sought in Appellees' Motions for Sanctions[DE #23] are also DENIED. I turn to whether the Bankruptcy Court committed legal

error in any of the Orders on appeal and/or cross-appeal.

II. Statement of Facts With Regard to the Orders on Appeal

This case has a long an unfortunate history and I have had the opportunity to deal with these parties in the past. Appellee James F. Walker filed a petition for Chapter 7 bankruptcy relief on April 25, 2003. Appellee attorney Gary J. Rotella ("Rotella") represented D. Debtor in the bankruptcy proceedings. Appellant represented Eleanor C. Cole and Florida Precision Calipers, Inc. In the bankruptcy proceedings. Ms. Cole and Florida Precision Calipers, Inc. were the two largest creditors in the bankruptcy.

Appellants allege that some time after Debtor filed for bankruptcy, Debtor's wife, Carol Ann Walker, transferred her interest in a certain of real property located in the Bahamas to Rotella. Carol Ann Walker transferred the property to pay Rotella's legal expenses incurred in the representation of her husband in the bankruptcy proceedings. Appellant claims that the real property belonged to Debtor and was the sole asset of the bankruptcy estate.

After Carol Ann Walker transferred the Bahamian property to Rotella, Appellant filed a motion titled Eleanor C. Cole's Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Associates P.A. From Representing the Debtor (the "Motion to Disqualify") on April 21, 2004. In the Motion to Disqualify, Appellant alleged that Rotella was conflicted from representing the Debtor because Rotella became a

person with an interest in the bankruptcy estate upon receipt of the Bahamian property. Appellant further alleged that the receiver the property gave Rotella in interest adverse to the estate.

On April 23, 2004, Appellant filed a notice setting the Motion to Disqualify for hearing on April 28, 2004. The next day, on April 24, 2004, Rotella served Appellant, by fax, with the proposed Rule 9011 Motion For Sanctions related to the Motion to Disqualify. On April 26, 2004, Rotella filed a Motion to Shorten 21 Day Notice Requirement For Filing a Motion For Sanctions Pursuant to Bankruptcy Rule 9011.

The April 24, 2004 letter reads, in relevant part: "[e]nclosed under this cover is [a] Motion For Sanctions Pursuant to Bankruptcy Rule 9011 that I intend to file against both your client, Eleanor C. Cole and you. The set Rule 9011 is twenty-one (21) days from the date of this correspondence to voluntarily withdraw Creditor, Eleanor C. Cole' S. Emergency Motion To Disqualify The Law Firm of Gary J. Rotella and Associates, P.A. [From] Representing Debtor (' Motion to Disqualify'). However, given your attempt to bring this frivolous evidentiary matter on for hearing on Wednesday, April 2008, that you also find enclosed under this cover Motion to Shorten 21 Day Notice. For Filing Motion For Sanctions Pursuant To Bankruptcy Rule 9011 ('Motion to Shorten')." That same day Appellant filed a pleading entitled Eleanor C. Cole's Supplemental Memorandum of Law in Support of Emergency Motion to Disqualify the Law Firm of Gary J. Rotella Associates PA From Representing the Debtor.

On April 27, 2004, Rotella sent Appellant a second letter by fax. Attached to this letter, Rotella served Appellant with his response to the Motion to Disqualify. Rotella also informed Appellant that his response to the Motion to Disqualify was "incorporated by reference into the Motion For Sanctions Pursuant to Bankruptcy Rule 9011 consistent with my correspondence under cover of April 24, 2004."

The Bankruptcy Court heard oral argument on the Motion to Disqualify on April 28, 2004, seven days after Appellant initially filed the Motion to Disqualify. After hearing arguments from the parties, the Bankruptcy Court denied the Motion to Disqualify. The Bankruptcy Court concluded that Eleanor C. Cole, as a creditor, did not have standing to assert any potential conflict of interest on behalf of any other members of the Debtor's family, including Debtor's uncle and brother. Further, the Bankruptcy Court concluded that Eleanor C. Cole's allegations that Mr. Rotella may be awareness in the Bankruptcy proceeding was premature. Lastly, the Bankruptcy Court ruled that Rotella's interest in the Bahamian property my preclude him from representing Carol Ann Walker in an adversary proceeding, however, that issue is not before the court because no adversary proceeding had been filed.

The Bankruptcy Court also heard oral argument on Rotella's Motion to Shorten 21 Day Notice Requirement For Filing a Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on April 28, 2004. The Bankruptcy Court orally denied the Motion to Shortened. In denying the Motion to Shorten, the Bankruptcy Court stated: "I'm going to deny it because it's moot, and frankly, Mr. Rotella, at this point, in that

I've ruled on the motion under Rule 11. If you wish to seek sanctions under any other authority, you may do so." (Emphasis added).

On May 12, 2004, the Bankruptcy Court issued a written Order Denying Motion to Shorten 21 Day. To File Motion For Sanctions Pursuant to Bankruptcy Rule 9011. Thereafter, on May 18, 2004, Rotella formally filed his Motion For Sanctions Against Mary Alice Gwynn, Esquire. That same date, appellant, on behalf of Eleanor C. Cole, filed a Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, PA (the "Renewed Motion to Disqualify"). The Court held a hearing on the Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, PA on May 28, 2004. I note that the written order which follow the Bankruptcy Court's oral ruling on the motion to shorten failed to include any specific reference to the Bankruptcy Court's admonition that Appellee could move for sanctions "under any authority" other than rule 9011. This may explain why that Court later granted award of sanctions under Rule 9011 after the same request was denied and expressly prohibited by the Bankruptcy Court or a late on April 28, 2004.

At the May 28, 2004 hearing, the Bankruptcy Court orally denied the Renewed Motion to Disqualify. At the hearing, the Bankruptcy Court stated: "I agree. I am going to grant your request, reserve on the amount of attorney's fees. I find that she did not have standing whatsoever to raise the issues that she did in the original motion. She cannot get around Rule 11 by filing a renewed or an amended motion that restates the same grounds and then a couple of extra grounds,

which subsequently I have found to be meritless since I dismissed the adversary proceeding, but as to the original motion, I hereby award attorney's fees." (Emphasis added).

The Bankruptcy Court awarded Appellee sanctions under Rule 9011 at the May 28, 2004 hearing after he verbally denied that request on April 28, 2004. Further, he granted Appellee Rule 9011 sanctions after he had already denied the Emergency Motion to Disqualify upon which the Rule 9011 Motion for Sanctions was based. The Bankruptcy Court entered his written Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on June 15, 2004. Thus, the Bankruptcy Court confused an already complicated and contentious matter.

On April 6, 2005, Appellant filed a Motion to Amend, Correct or Withdraw the Court's Order Granting the Debtor's Motion For Sanctions Pursuant to Rule 9011 and Rule 60 of the Federal Rules of Civil Procedure. The Bankruptcy Court denied the Motion on April 8, 2005. Appellant also filed a Motion to Strike or Dismiss Debtor, James F. Walker's Motion For Sanctions Against Mary Alice Gwynn Pursuant to Bankruptcy Rule 9011 For Failure to Abide By Rule 11 of the Federal Rules of Civil Procedure. The Bankruptcy Court also denied this motion on May 8, 2005.

On April 21, 2005, the Bankruptcy Court held a hearing to determine the amount of sanctions to which Appellee was entitled pursuant to his earlier Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on June 15, 2004. At the hearing, Appellate disputed Rotella's contention that he properly complied

with safe harbor provision in Rule 9011 and she vigorously disputed the amount of sanctions Appellee claimed he incurred. In response to Appellant's argument that Appellee failed to comply with the safe harbor provision of Rule 9011, Appellee discounted the importance of the safe harbor provision. Appellee argued "I would also like to point out to the court, this 21 day thing which we're getting hung up on, sometimes also the Court has inherent power under 28 U.S.C. Sec. 1927 to sanction any attorney...To the extent necessary, Judge, we would make an ore tenus motion for that application". (Emphasis added). The Court granted Appellee's request for sanctions under Rule 9011 alone. The court entered a Final Judgment awarding Appellee $80,572.50 in sanctions against Appellant. This matter was the subject of a previous appeal that was pending before this Court. On April 4, 2006, I entered and Order Vacating Final Judgment of Bankruptcy Court and remanded this matter back to the Bankruptcy Court based upon the Bankruptcy Court's award of sanctions pursuant to Bankruptcy Rule 9011.

At the Oral Argument on this appeal and cross-appeal held on March 2, 2007, the parties stated that the Bankruptcy Court had amended the amount of sanctions imposed on Appellants pursuant to 28 U.S.C. Sec 1927 several times over the course of the bankruptcy proceeding. The record reflects on August 9, 2005, the Bankruptcy Court entered its Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the court's Order of July 17, 2003. In that

Order, the Bankruptcy Court awarded Appellees/Cross-Appellants sanctions against Appellant in the amount of $39,057.50. Appellees/Cross-Appellants requested $99,402 in sanctions pursuant to 28 U.S.C. Sec 1927.

On August 29, 2005, the Bankruptcy Court entered its Appendix To Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating to Creditor, Eleanor C. Cole' S. Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. On October 7, 2005, because the Bankruptcy Court had mistakenly liquidated the amount of sanctions without a separate evidentiary hearing entered, it entered its Order Vacating Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating To Creditor Eleanor C. Cole' S. Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. Also, on October 7, 2005, the Bankruptcy Court entered an Amended Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating To Creditor, Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003.

On December 16, 2005, Rotella prepared an Interim Statement dated December 16, 2005 which included as Exhibit "N" and introduced into evidence at the February 16, 2005. Exhibit "N" outlined Appellees/Cross-Appellants' alleged billable time and expenses for March 16, 2005. On February 16, 2006, the

Bankruptcy Court conducted its evidentiary liquidation hearing on Appellees/Cross-Appellants' Motion for Sanctions. Appellant allegedly walked out of Court and Appellees/Cross-Appellants presented evidence. The April 26, 2006 Memorandum Order was entered, wherein the Amended Order Granting Sanctions Against Gwynn was vacated and Appellee/Cross-Appellants' Motion for Sanctions was granted, with an award of sanctions entered therein against Appellant in Appellees/Cross-Appellants' favor in the amount of $14,000.

While the issue of the award of Bankruptcy Rule 9011 sanctions was on appeal before this Court, the parties continue to fight over several other issues in the underlying Bankruptcy Court. On February 6, 2006 Appellant filed her Emergency Motion for Recusal along with supporting Affidavit. Also on February 6, 2006, Appellant filed an Emergency Motion to Stay the Febrauary 6, 2006 hearing on the amount of sanctions to be awarded pursuant to Appellee/Cross-Appellants Renewed Motion for Sanctions filed on April 21, 2005. On February 8, 2006, Appellant filed her first affidavit in support of her Motion for Recusal. On February 10, 2006, the Bankruptcy Court entered its Order Denying Mary Alice Gwynn's Emergency Motion for Recusal and Denying Emergency Motion to Stay the Hearing on Debtor's Renewed Motion for Sanctions. On February 10, 2006, Appellant filed her Emergency Motion for Consideration of the Court's Order Denying Mary Alice Gwynn's Emergency Motion for Recusal and Denying Emergency Motion to Stay the Hearing on Debtor's Renewed Motion for Sanctions. On February10 2006, Appellant filed her Second Supplemental Affidavit in support of her Motion for

Recusal and her Motion for Reconsideration, which was denied by the Court on February 14, 2006.

On February 16, 2006, the Bankruptcy Court conducted a hearing on the amount of sanctions to be awarded pursuant to Appellee/Cross-Appellants Renewed Motion for Sanctions. On February 24, 2006, Mr. Rotella filed 2 ex parte Motions for Entry of Break Order for Appellant's law office and homestead. On February 27, 2006, the Bankruptcy Court granted the ex parte Motions to break into and enter Appellant's law office and homestead in aid of execution of the Bankruptcy Court's award of a previous judgment for Rule 9011 sanctions against Appellant. On February 28, 2006, a hearing was held on Appellant's Emergency Motion for Restraining Order, and response to the ex parte break and and entry Orders, which was denied by the Bankruptcy Court.

On April 10, 2006, the Bankruptcy Court entered a Sua Sponte Order Directing Appellant to File Sworn Certification of Qualifications to Practice Before the Bankruptcy Court. On April 13, 2006, Appellant filed her Motion for Reconsideration of Court's Sua Sponte Order Directing Appellant to File Sworn Certification of Qualifications to Practice Before the Bankruptcy Court. On April 17, 2006 Appellant filed her Sworn Certification of her Qualification to Practice in front of the Bankruptcy Court.

On April 26, 2006, the Bankruptcy Court entered its Memorandum Order awarding sanctions to Debtor's counsel pursuant 28 U.S.C. Sec 1927 against the Appellant and issued an Order to Show Cause why Mary Alice Gwynn Should Not Be Suspended From

Practicing Before the Bankruptcy Court, Suspended or Otherwise Disciplined Pursuant to Local Rule 2090(2). On April 26, 2006, the Bankruptcy Court also entered its Final Judgment against Appellant, awarding $14,000 in sanctions to Debtor's counsel. The same day, the Bankruptcy Court, through his law clerk, sent a letter to the Florida Bar requesting an investigative file be opened purusuant to the Court's Memorandum Order of the same date. On May 5, 2006, Appellant filed her Motion to Stay Execution of Final Judgment, which was denied on June 8, 2006.

On May 5, 2006 the Bankruptcy Court entered its Sua Sponte Order Directing Mary Alice Gwynn, Esquire To Stop Filing Notices of Filing. On May 22 2006, Appellant filed her Response to the Court's Order to Show Caused responding to the Bankruptcy Court's question why the Appellant should not be suspended or disciplined pursuant to Local Rule 2090(2). On May 26, 2006, the Court held a hearing on Appellant's Emergency Motion to Stay Final Judgment and the Court's Motion to Show Cause and Appellant's Motion for Reconsideration of the Court's Sua Sponte Order Correcting Mary Alice Gwynn, Esquire to Stop Filing Notices Of Filings. On June 7, 2006, the Bankruptcy Court entered its Order Denying Mary Alice Gwynn's Motion for Reconsideration of the Court's Sua Sponte Order imposing sanctions and striking several of Appellant's filings. On June 27, 2006, the Bankruptcy Court entered its Order Denying Relief Requesting and Mary Alice Gwynn's Amended Reply. July 7, 2006, Appellant filed her Motion for Evidentiary [hearing] on All Issues Raised in Mary Alice Gwynn's Amended Reply, which was denied. Thereafter, Appellant filed this is an appeal and Appellees/Cross-Appellants filed

their appeal of certain Orders. The Orders on cross-appeal will be discussed below.

III. Standard of Review

The Bankruptcy Court's findings of facts should not be set aside unless they are clearly erroneous. Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.), 904F. 2D 588, 593 (11th Cir. 1990); and In re: T&B Gen. Contracting, Inc., 833 F2D 1455, 1458 (11th Cir. 1987). A finding is clearly erroneous when although there is evidence to support it, the reviewing court, after weighing the entire evidence, is left with a definite and firm conviction that a mistake has been committed. Anderson v. City of Bessemer City, N.D., 470 US 564, 573 (1985). According to that standard, this court may reverse if it's "review of the record as a whole leaves [it] with the definite and firm conviction that a mistake has been committed." In Re: Monetary Group, 2 F. 3d 1098, 1106 (11th Cir. 1993) (quoting to United States v. US Gympsom Co., 333 US 364, 395 (1948)). Conclusions of law, on the other hand, are reviewed on a de novo basis. Olympia & York Florida Equity Corp. v, The Bank of New York (In re Holywell Corp.), 913 F. 2D873, 879 (11th Cir. 1990). Conclusions of law, mixed issues of law and fact, "ultimate facts" are all subject to de novo review. In Re: Cohen Chase & Sandborg Corp., 904 F2D 593; In re: Sublett, 895 F2D 1381, 1383 (11th Cir. 1990); and In re: Marks, 131 B.R. 220, 222 (S.D> Fla. 1991). As to questions of law, a district court should independently examine the law and draw its own conclusions after applying the law to the facts. In re Empire for Him, Inc., 1 F. 3 1156, 1159 (11th Cir. 1993).

IV. Legal Analysis

The parties' arguments can be summarized as follows. Appellant argues that the "lower court's reliance on 28 U.S.C. 1927 as authority to impose sanctions in the instant case was legally incorrect." Alternatively, Appellant argues that even if application of section 1927 was correct, the requirements of the same have not been met as the court's legal conclusions and factual determinations with regard to her behavior and amount of sanctions are not supported by the record. Additionally, Appellant argues that the Bankruptcy Court erred in denying her Motion to Recuse pursuant to 28 USC Sec 144. In response, Appellees/Cross-Appellants argue that the Bankruptcy Court's "award of sanctions against Appellant in the amount of $14,000 constitutes an overwhelming abuse of its discretion to impose sanctions, and that said award was made in error, and in that the amount of the award, to wit: $14,000 is grossly insufficient and inadequate, as a matter of fact and law, based upon the well-documented record..." Appellees/Cross-Appellants also argue that this Court should award them $281,917.02 as sanctions against Appellant.

On cross-appeal, Appellees/Cross-Appellants argue that Bankruptcy Court erred as a matter of law in denying their "Amended Motion for Attorneys' Fees and Costs against Eleanor C. Cole and Mary Alice Gwynn" when it ruled that Bankruptcy Rule 7037, rather than that court's inherent powers is the appropriate authority to reply upon in this matter. Additionally, Appellee/Cross-Appellants argue that the Bankruptcy Court erred as a matter of law in denying "Debtor's Amended Motion for Attorneys' Fees and Costs against Eleanor C. Cole and Mary Alice Gwynn as to Mary Alice Gwynn" when it ruled that there had

been no evidence presented that Cole's discovery conduct was carried out at Appellant's direction or upon Appellant's advice.

A. Bankruptcy Court Did Not Abused its Discretion When It Awarded Sanctions Against Appellant Pursuant to 28 U.S.C. Sec 1927 in the Amount of $14,000

Section 1927 of Title 28 of the United States Code provides as follows:

> Any attorney or other person admitted to conduct such cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

At the oral argument on this appeal and cross-appeal held on March 2, 2007, the parties stated that the Bankruptcy Court had amended the amount of sanctions imposed on Appellant pursuant to 28 U.S.C. Sec. 1927 several times over the course the bankruptcy proceeding. The record reflects that on August 29, 2005, the Bankruptcy Court entered its Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec. 1927 and 11 U.S.C. Sec. 105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. On October 7, 2005, because the Bankruptcy Court had mistakenly liquidated the amount of sanctions without a

separate evidentiary hearing entered, it entered its Order Vacating Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec. 1927 and 11 U.S.C. Sec. 105 Relating To Creditor Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. Also, on October 7, 2005, the Bankruptcy Court entered and Amended Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec. 1927 and 11 U.S.C. Sec. 105 Relating To Creditor, Eleanor C. Cole' S. Motion For Sanctions Against Erie J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003.

On December 16, 2005, Rotella prepared an Interim Statement dated December 16, 2005 which included as Exhibit "N." Exhibit "N" outlined Appellees/Cross-Appellants' alleged billable time in expenses forward from March 16, 2005. On February 16, 2006, the Bankruptcy Court conducted its evidentiary liquidation hearing on Appellees/Cross-Appellants' Motion for Sanctions. Appellant allegedly "walked out" of Court and Appellees/Cross-Appellants' presented evidence. The April 26, 2006 Memorandum Order was entered, wherein the Amended Order Granting Sanctions Against Gwynn was vacated and Appellees/Cross-Appellants Motion for Sanctions was granted, with the award of sanctions entered therein against Appellant in Appellee/Cross-Appellants' favor in the amount of $14,000.

There is no question that the Bankruptcy Court has the authority to award sanctions against Appellant pursuant to 28 U.S.C. Sec. 1927 pursuant to its jurisdictional relationship with the District Court. In

Re Lawrence, 2000 WL 33950028 *4 (Bankr. S.D. Fla. 2000) (accord Huff v. Brooks (In re Brooks), 175 B.R. 409, 412 (Bankr. S.D. Ala. 1994)). The issue is whether the Bankruptcy Court erred as a matter of law in awarding the sanctions and whether the amount of sanctions are reasonable.

The Eleventh Circuit has explained that section 1927 is a "sanctioning mechanism... aimed at the unreasonable and vexatious multiplication of proceedings." Byrne v. Nezhat, 261 F3D 1075, 1106 (11th Cir. 2001). Moreover, section 1927 differs slightly from Fed. R. Civ. P. 11 in that Rule 11 is aimed primarily at pleadings, while section 1927 aims to prevent dilatory tactics throughout the litigation. Id. Another difference from Rule 11 and is that "awards pursuant to section 1927 may be imposed only against the offending attorney; clients may not be saddled with such awards". Id. (quoting United States v. Int'l B'hd of Teamsters, Chauffers, 948 F2D 1338, 1345 (2nd Cir. 1991)).

Section 1927 is "penal" in nature and, thus its provisions must be strictly construed. Peterson v. BMI Refractories, 124 F3D 1386, 1395 (11th Cir. 1997). There are three (3) essential requirements that must be satisfied with respect to an award of sanctions under Section 1927. Id. at 1396. The first requirement is that the attorney in question must engage in "unreasonable and vexatious" conduct. Id. Second, such conduct must multiply the proceedings. Id. Third, "the dollar amount of the sanction must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the 'costs, expenses, and attorneys' fees reasonably incurred because of such conduct.'" Id. (citing 28 U.S.C. Sec. 1927).

In Peterson, the 11th Circuit noted: "There is little case law in this circuit concerning the standard applicable to the award of sanctions under section 1927." Peterson, 124 F3d at 1399. The 11th Circuit recently acknowledged that its "cases are perhaps somewhat unclear [with respect to the requirements of section 1927]; either they require subjective bad faith, which may be inferred from reckless conduct, or they merely require reckless conduct, which is considered 'tantamount to bad faith.'" Cordoba v. Dilliard's, Inc., 419 F3d 1169, 1178 (11th Cir. 2005).

In an Order dated April 26, 2006, the Bankruptcy Court evaluated each of the factors relevant for evaluating whether section 1927 sanctions should be imposed. First, the Bankruptcy Court reviewed Appellant's behavior during the course of the bankruptcy proceeding and concluded that Appellant's conduct is tantamount to bad faith.

On this point, that Bankruptcy Court held:

> [Appellant's] conduct has been sufficiently reckless to warrant a finding of conduct tantamount to bad faith. The court further finds that her frivolous claims were prosecuted for the purposes of harassing her opponent such that he conduct has been tantamount to bad faith. [Appellant] failed to conduct even the most routine investigation before lodging completely unfounded allegations regarding Rotella's honesty and candor with the Court. It is bad faith and an abuse of process for [Appellant] to lodge unfounded and un-investigated allegations that opposing counsel perpetrated a fraud upon

> the Court and was generally dishonest, then withdraw the pleadings containing those allegations at the hearing without notice to Rotella, and maintain that based upon that withdrawal she should not be sanctioned.

The Bankruptcy Court also carefully considered the amount of sanctions to be imposed against Appellant. In deciding on the amount of sanctions, the Bankruptcy Court considered the multiplication of the proceeding caused by Appellant's behavior. Also in rendering a decision on the amount of sanctions to impose, the Bankruptcy Court also considered Appellees/Cross-Appellants' request for sanctions. On this point, and the Bankruptcy Court stated:

> Rotella's Motion for Sanctions originally sought $99,402.50 for fees and costs allegedly incurred in this matter through March 18, 2005. He now seeks fees and costs in the amount of $241,270 through February 8, 2006. Indeed, Rotella has represented to the Court that the fees and costs incurred are actually several times more than the amount he seeks here. In addition, the Second Amended Discovery Sanctions Motions seeks $57,478.25 space and Rotella's sanctions motion for Cole's Motion to Disqualify sought $80,572.50. The amounts sought by Rotella juxtaposed against the estate having received total funds of $56,028.20 through December 31, 2005, compels the Court to ask what has gone wrong? Taken as a whole, the grossly excessive amount of sanctions sought by Rotella shocks this Court's conscience.

Moreover, the Bankruptcy Court found that Appellees/Cross-Appellants' responses to Appellant's "attacks were disproportionately 'over the top'" and that Appellees/Cross-Appellants had been using a "sledge hammer to kill a flea." Then, the Bankruptcy Court correctly stated, "sanctions imposed pursuant to section 1927 'must bear a financial nexus to the excessive proceedings, i.e., the sanction may not exceed the 'costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The Bankruptcy Court found that "Rotella shares some fault for the unreasonable multiplication of these proceedings as a consequence of his unmeasured, and at times unnecessary, response to [Appellant]." The Bankruptcy Court also conclude that had Appellees/Cross-Appellants had a more measured response, the Court's best estimate for the reasonable amount of the excess costs, expenses, and attorney's fees incurred because of Appellant's having unreasonably and vexatiously multiplied the proceedings would be 40 hours at $350 per hour. The Bankruptcy Court then gave a detailed break-down of the hours that it should have taken Appellees/Cross-Appellants to respond to Appellant. Lastly, the Bankruptcy court stated:

> The Court finds that award in the amount of $14,000 is reasonable and appropriate pursuant to 28 U.S.C. Sec. 1927 for the excess proceedings necessitated by [Appellant's] unreasonable and vexatious conduct. The Court also finds that imposition of sanctions against [Appellant] in the amount of $14,000 is appropriate pursuant to 11 U.S.C. Sec. 105 and Court's inherent power 'to manage its affairs which necessarily includes the authority to impose reasonable and appropriate

> sanctions upon errant lawyers practicing before it." (Citations omitted).

On appeal, Appellant bears the burden of demonstrating that the Bankruptcy Court's imposition of sanctions was an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 US 384 (1990) (appellate courts should give great deference to the decision of courts on the "front lines" of litigation to impose Rule 11 sanctions in order to free appellate courts from reevaluating evidence and reconsideration facts already weighed and considered by the trial court). Id. at 403-05. United States v. Frazier, 387 F3D 1244, 1259 (11th Cir. 2004) (en banc) "the application of an abuse-of-discretion review recognizes the range of possible conclusions the trial judge may reach. [W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard.") See also, Schwartz v. Millon Air, Inc., 341 after 3D 1220, 1225 (11th Cir. 2003) (court reviews sanctions under 28 U.S.C. Sec. 1927 for abuse of discretion); and Barnes v. Dalton, 158F3D 1212, 1214 (11th Cir. 1998) (court reviews sanctions under inherent powers for abuse of discretion) and Cooter & Gell v, Hartmarx Corp., 496 US 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law....").

Having reviewed the record and the Bankruptcy Court's analysis, I conclude that Appellant has not met her burden of proving that the Bankruptcy court's imposition of sanctions was an abuse of its discretion. Furthermore, I cannot conclude that the Bankruptcy Court's factual determinations with regard to the

amount of time that should have been spent in responding to Appellant's Motion was clearly erroneous. Accordingly, the Bankruptcy court's imposition of $14,000 in sanctions against Appellant is hereby AFFIRMED.

Likewise, I conclude that Appellees/Cross-Appellants' arguments are without merit as well because their arguments insufficiently attacked the Bankruptcy Court's factual findings with regard to the amount of time estimated to reasonably respond to Appellant's behavior. As stated above, the Bankruptcy Court's factual determinations with regard to the amount of sanctions to impose against Appellant were not clearly erroneous and it did not apply incorrect legal standards. Thus, I AFFIRM the Bankruptcy Court's orders with regard to the imposition of sanctions pursuant to 28 U.S.C. Sec. 1927 against Appellant in the amount of $14,000.

B. The Bankruptcy Court Did Not Commit Any Legal Error In Denying Appellant's Emergency Motion For Recusal.

Appellant argues that the Bankruptcy Court committed legal error in denying Appellant's Emergency Motion for Recusal. Specifically, Appellant stated that the grounds for refusal are as follows:

> 1) the court accepted carte blanche all proposed order from Appellee, which included finds that were both favorable to his position to the detriment of appellant. Moreover, the new findings were never articulated in the ore tenus rulings in open court; 2) the court sua sponte

> amended its original order on two separate occasions, to ensure that appellant would be sanctioned under any available legal theories; 3) the court issued to ex parte "break and enter orders" into appellant's home and law office, which would have allowed federal marshals on bright authority to seize any and all property of appellant to satisfy Appellee's previous judgment for sanctions; 4) filing Appellee's complaints against the appellant to the Florida Bar, the court likewise filed complaints.

Moreover, Appellant argues that the Bankruptcy Court's Order is flawed in that it only addresses personal bias, which must come from extra judicial source rule.

Section 455 creates two primary reasons for recusal. See 28 U.S.C. Sec. 455(s)-(b).Under subsection 455 (a), a judge to recuse himself or herself under section 455(a) one there is an appearance of impropriety. See Id. Sec 455(a). Section 455(a) provides, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Id. "The very purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety when ever possible." Lileberg v. Health Servs. Acquisition Corp., 46 US 47, 865 (1988). Thus, the standard of review for a second 455(a) motion "is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds of which recusal was sought would entertain a significant doubt about the judge's impartiality," Parker v. Connors Steel Co., 855 F. 2d 1510, 1524 (11th Cir. 1988), and any doubts

must be resolved in favor of recusal, United States v. Kelly, 888F2D732, 745 (11th Cir. 1989). However, a party's complaints regarding "judicial rulings, routine trial administration efforts, and an ordinary admonishments (whether or not legally supportable) to counsel" are not sufficient to require recusal. Liteky v. United States, 510 US 540, 556 (1994). The exception to this rule is "when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party." Hamm v. Board of Regents, 708F2D 647, 651 (11th Cir. 1983). Mere "friction between the court and counsel," however, is not enough to demonstrate quote pervasive bias." Id.

Subsection 455(a) provides that a judge shall also disqualify himself or herself in the following circumstances:

> (1) Where he has a personal bias or prejudice concern a party, or personal knowledge of disputed evidentiary facts concerning proceeding;
>
> (2) Where in private practice he served as [a] lawyer in the matter of controversy, or a lawyer with whom he previously practiced law served during such Association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning that;
>
> (3) Where he has served and governmental appointment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion

concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected it by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. Sec. 455(b)(1)-(5).

As of the Eleventh Circuit has stated, an appellate court reviews the decision of a judge not to recuse himself for abuse of discretion and an appellate court will affirm that decision "unless we conclude that the impropriety is clear and one which would be recognized by all objective, reasonable persons." United States v.

Bailey, 175F3D966, 968 (11th Cir. 1999). In light of these principles in the record before me, I reject Appellant's argument that the Bankruptcy Court should have recused himself. Indeed, I conclude that no reasonable basis exists in the record for Appellant's accusation of bias on the part of the Bankruptcy Court judge. In reaching this decision, I have closely examine each of the Appellant's allegations. First with regard to the proposed Orders which were allegedly "ghost-written." While the appellate courts have repeatedly condemned the use and dangers of proposed orders drafted by parties, the practice in itself is not evidence of a bias on the part of the Bankruptcy judge in question in this matter. Second, the evidence in the record does not demonstrate that the Bankruptcy Judge ignored the law and/or the constitutional rights of Appellant in favor of the Appellee Mr. Rotella. Third, the Bankruptcy Court's letter to the Florida Bar describing Appellant's behavior during the course of this matter does not in itself demonstrate bias of the court. See generally 5-H Corp. v. Padovano, 708 So. 2d 2D 244 (Fla. 1997) (noting that a judge's mere reporting a perceived attorney lack of professionalism to Florida Bar, in and of itself, is legally insufficient to support judicial disqualification.) Finally, the Bankruptcy Court's issuance of 2 ex parte "break and enter orders" into a Appellant's home and law office, which would have allowed federal marshals authority to seize any and all property of Appellant to satisfy Appellee's previous judgment for sanctions does not reflect a bias of the Bankruptcy Court judge against Appellant.

If the Bankruptcy Court was at times caustic in tone, that attitude reflects the judge's exasperation with Appellant's as well as the Appellees/Cross-Appellants' pattern of rude and unprofessional conduct displayed

throughout this underlying proceeding. The underlying case was not a complicated matter, however, the actions of all parties produce thousands of pleadings. Even if the bankruptcy court's exasperation with appellant could be characterized as "friction between the court and counsel," such friction, as I have pointed out, is not enough to show "pervasive bias" working recusal. Hamm, 708 F.2d a t 651.

I next examine whether the Bankruptcy Court correctly applied 28 U.S.C. Sec. 144. Once a party follows a timely and sufficient affidavit that the trial judge is personally prejudiced against him, 28 U.S.C. Sec. 144 demands the trial judge's recusal. While the trial judge may not pass upon the truthfulness of the affidavit's allegations, he or she must determine whether the facts that out in the affidavit are legally sufficient to require recusal. Davis v. Board of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975). The basis for legal sufficiency adopted by the 11th Circuit requires defendant to show:

> 1. The facts are material and stated with particularity.
>
> 2. The facts are such that, if true they would convince a reasonable person that a bias exists.
>
> 3. The fact showed the bias is personal, as opposed to judicial, in nature.

Parrish v. Board of Commissioners of Alabama State Bar, 524 F. 2d 98, 100 (5th Cir. 1975).

To be disqualified under 28 U.S.C. Sec. 144, the alleged bias and prejudice must stem from an extrajudicial source. United States v. Grinnell Corp., 384 US 563, 583 (1966); Davis v. Board of School Commissioners, 517 F. 2d at 1051 (origin of alleged bias was language in order then before the court and an opinion in a previous case). See, e.g., Berger v. United States, 255 US 22 (1921) (prejudice against German-Americans). The law of this Circuit is clear that "[t]o warrant recusal under Sec. 144 "must demonstrate that the alleged bias as personal as opposed to judicial in nature.... The alleged bias must stem from an extrajudicial source and result in opinion on the merits on some basis other than what the judge learned from his participation in the case. Thus, a motion for disqualification may not ordinarily be based on the judge's rulings in the same case." United States v. Meester, 762 F. 2d 867, 884 (11th Cir. 1985) (citations omitted); see also Loranger v. Stierheim, 10 F. 3d 776, 780 (11th Cir. 1994) ("as a general rule, a judge's rulings in the same case are not valid grounds for recusal"). Mere adverse rulings do not constitute the sort of pervasive bias and necessitates recusal. Loranger, 10 F. 3d 781.

A careful review of Appellant's Motion reveals that she sought recusal merely because she was unhappy or disagreed with the Bankruptcy Court's Orders including the imposition of sanctions against her in the issuance of the break-and Orders to impose sanctions previously awarded. However such a showing falls well short of the necessary threshold for recusal or disqualification of the Bankruptcy judge. See Draper v. Reynolds, 369 F. 3d 1270, 1282-82 (11th Cir. 2004) (district court did not err in denying motion to disqualify under Sec. 144 were movant presented no

evidence that judge harbored a personal bias or prejudice either against him or in the favor of any adverse party).

Under the standard review described above, none of Appellant's complaints regarding the Bankruptcy Court's actions requires recusal under 28 U.S.C. Sec. 455(a) or (b) or 28 U.S.C. Sec. 144. The rulings against an admonishment of Appellant do not demonstrate bias and do not give rise to a significant or reasonable doubt about the Bankruptcy Court's impartiality. U.S. v. Patti, 337 F. 3d 1317, 1321 (11th Cir. 2003). Specifically, I conclude that the Bankruptcy Court properly denied the motion to disqualify pursuant to 28 U.S.C. Sec. 144 because the alleged bias was judicial rather than personal and because the facts and the affidavit would not have convince a reasonable person of the existence of personal bias against Appellant. In reaching this conclusion, I have reviewed each of Appellant's grounds for recusal and I conclude that none of the proffered reasons are sufficient for recusal. Thus, I conclude that the Bankruptcy Court did not err as a matter of law when it did not recuse and all Orders related to this issue are AFFIRMED.

C. Appellees/Cross-Appellants' Cross-Appeals Are Without Merit

Appellees/Cross-Appellants argue that the Bankruptcy Court improperly entered both Order (1) in the April 26, 2005 Memorandum Order wherein it denied Appellees' Second Amended Discovery Motion and Order (2) in the "Ordered and Adjudged" clause contained at page 3 of the Final Judgment entered on April 26, 2006, wherein the Bankruptcy Court denied

Appellee Walker's Second Amended Discovery Sanctions Motions. Specifically, Appellees/Cross-Appellants argue that the Bankruptcy Court erred as a matter of law and/or fact when it entered its Order Denying Appellees/Cross-Appellants Second Amended Discovery Sanctions Motion on the basis thatBankruptcy Rule 7037, rather than the Bankruptcy Court's inherent power provides the basis for the imposition of sanctions. Additionally, Appellees/Cross-Appellants argue that the Bankruptcy Court erred when it concluded that there had been no evidence presented that Cole's obstructive discovery conduct was Appellant's fault.

In order to determine whether the Bankruptcy Court arrived at a decision granted in the law and facts, I examine the underlying facts related to the Orders being appealed by Appellees/Cross-Appellants. On February 23, 2004, Cole's filed a Motion for a Protective Order with three Affidavits from her treating physician stating that a deposition at that time was detrimental to Cole's health and against medical advice. On March 29, 2004, Appellee James F. Walker filed his Motion for Attorney's Fees and Costs against Cole. On May 25 2004, Appellee James F. Walker filed his Amended Motion for Attorney's Fees and Costs Against Eleanor Cole. On May 28 2004, the Bankruptcy Court held the hearing on very's Motions, which included Appellees/Cross-Appellants' Motion and Amended Motion for Attorney's Fees and Cost Against Eleanor Cole. At the May 28th 2004 hearing on the Motion and Amended Motion, Appellants/Cross-Appellee objected to the Appellees/Cross-Appellants' Amended Motion for Attorney's Fees and Costs Against Eleanor Cole. Additionally, Appellant/Cross-Appellee attacked the

amount of fees demanded. At the May 28 2004 hearing, the Bankruptcy Court rescheduled the hearing to give Appellant/Cross-Appellee time to review and prepare a response to the Motions.

On June 7, 2004, Appellant/Cross-Appellee withdrew from representing Cole and was substituted by new counsel. On April 21, 2005, Cole's new counsel who also withdrew some two weeks earlier was present and consented to Mr. Rotella's statement to the Bankruptcy Court that Cole instructed her new counsel that she could not and would not sit for a deposition. Subsequently, sanctions were posed against Cole.

At the April 21, 2005 hearing, Mr. Rotella stated:

> At the hearing on April 6th, Judge, you stated on the record, 'And I have reviewed A, B, and C, the amount of fees are reasonable. They were necessary and were properly incurred in the defense of this action in the prosecution of your positions, and I will award the fees requested therein and as to Ms. Cole, in addition to striking her claims." I believe that your same thinking should apply here, Judge, as we should be able to move through these two motions expeditiously with the application of that thinking.

At the April 21, 2005 hearing, Mr. Rotella was attempting to have the same amount of fees previously awarded pursuant to his default against Cole, award against Appellant/Cross-Appellee. Also at the April 21, 2005 hearing, Appellant/Cross-Appellee argued that because she was not prepared to defend against the Motions because she was not placed on notice that

Appellees/Cross-Appellants were seeking fees and costs against her. Following the hearing on April 21, 2005, Appellees/Cross-Appellants faxed to the Appellant/Cross-Appellee's Amended Motion for Attorney's Fees and Cross Against Creditor Eleanor C. Cole and Mary Alice Gwynn, Esquire denying Debtor's Amended Motion for Attorney's Fees and Cost Against Creditor Eleanor C. Cole and Mary Alice Gwynn, Esquire and part. At page 18-19 of the April 26, 2006 Memorandum Order, the Bankruptcy Court made the following ruling:

> "The Court previously ruled that Cole's refusal to appear and testify at her deposition while under subpoena, or to otherwise participate in discovery, after 20 months of scheduling and rescheduling, was willful and in complete disregard of the Court, its law and its parties involved in this proceeding. (Cole Default Order at page 17). However, the Court finds that there was no evidence presented that Cole's obstructive of discovery conduct was Gwynn's fault, having either been carried out at Gwynn's directions, or upon Gwynn's advice. Absent evidence of Gwynn's culpability in advancing Cole not to appear and testify at her deposition, or to otherwise not participate in discovery, there exists no basis pursuant to Bankruptcy Court 7037, or pursuant to any other authority to assess sanctions against Gwynn..."

It is well-established that a Bankruptcy Court's findings of fact will not be set aside unless they are clearly erroneous. In re Chase & Sanborn Corp., 904 F. 2d 588, 593 (11th Cir. 1990). By that standard, this Court

may reverse if "review of the record as a whole leaves [it] with the definite and firm conviction that a mistake has been committed." In re Monetary Group, 2 F. 3d 1098, 1106 (11th Cir. 1993) (quoting to United States v. U.S. Gypsum Co., 333 US 364, 395 (1948)). On appeal, Appellees/Cross-Appellants also bear a heavy burden of demonstrating that the Bankruptcy Court's failure to impose sanctions was an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 US 384 (1990) (appellate courts should give great deference to the decision of courts on the "front lines" of litigation to impose Rule 11 sanctions in order to free appellate courts from reweighing evidence and reconsidering facts already weighed and considered by the trial court). Id. at 403-05. See e.g. Schwartz v. Millon Air, Inc., 341 F. 3d 1220, 1225 (11th Cir. 2003) (court reviews sanctions under 28 U.S.C. Sec. 1927 for abuse of discretion); and Barnes v. Dalton, 158 F. 3d 1212, 1214 (11th Cir. 1998) (court reviews sanctions under inherent powers for abuse of discretion).

Having reviewed the record and the orders in question, I conclude that the Bankruptcy Court did not err as a matter of law and that it's factual determinations were not clearly erroneous when it denied the Amended Motion for Attorney's Fees and Cross Against Eleanor Cole and Mary Gwynn, as to Mary Alice Gwynn. In reaching this conclusion, I considered the fact that the Bankruptcy Court made a specific and clear factual determination that there was a lack of evidence to prove that Cole's obstructive discovery conduct was Appellant/Cross-Appellee's fault. Specifically, the Bankruptcy Court held that there was no evidence that Cole's behavior was either. Out at Appellant/Cross-Appellee's direction or upon Appellants/Cross-

Appellee's advice. If I were to reverse the Bankruptcy Court on this factual determination or decide otherwise, I would be in properly reconsidering facts already weighed and considered by the Bankruptcy Court judge who had first-hand knowledge of the parties' actions throughout the course of this proceeding. Additionally as a matter of law, I conclude that the Bankruptcy Court did not err when it relied upon Bankruptcy Rule 7037, rather than the inherent power of the court doctrine.

However even if I were to assume that the inherent power of court doctrine could or should have applied, I would reach the same conclusion. A court's inherent power to supervise and sanction parties before it are governed not by rule or statute, but by the inherent control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. Link v. Wabash Railroad Co., 370 US 626 (1961). A federal court has the authority to, and must not avoid responsibility for, monitoring the conduct of all litigants and attorneys who come before it. Tutu Wells Contamination Lit., 161 F.R.D. 46, 62 (D.Vi. 1995) citing Chambers v. NASCO, Inc., 501 US 32, 43 – 46 (1991). The court's obligation is to protect not only litigants who may suffer from abusive litigation practices other adversaries, but also to promote the proper function of a fair and effective judicial system which, while it is adversarial, need not also be callous, uncivil, sneak or boody-trapped. Derzack v. County of Allegheny, Pennsylvania, 173 FRD 400, 411 (W.D. Penn. 1996). When appropriate, the court may use its inherent power to prevent the perpetuation of a "fraud upon the court.' "'Fraud on the court' occurs where it can be demonstrated, clearly and

convincingly, that a party has sentiently set in motion some unconscionable scheme tax related to interfere with the judicial system's ability him partially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corporation, 892 F. 2d 1115, 1118 (1st Cir. 1989). Where misconduct clearly implicates a specific rule, a court should consult and consider it as an avenue of discipline or relief. Martin v. Brown, 63 F. 3d 1252, 1264 (3rd Cir. 1995). However, there may be, under given circumstances, substantial overlap amongst the various rules, and the inherent power of the court overlaps the entire litigation process and "extends to a full range of litigation abuses." Chambers, 501 US at 46. Accordingly, the court's inherent power is broad and can be called upon not only to fill-in the interstices between particular rules of conduct, but also may be referred to in addition to set rules, were appropriate. Id. at 46. Nevertheless, the court's inherent power must always be exercised with caution, id at 43, and the court must take "care in the use of inherent powers to impose sanctions." Martin, 63 F. 3d at 1265.

Due to the scope of the inherent powers vested in federal courts, however, it is necessary that such courts "exercise caution and in invoking [their] inherent power." Chambers, 501 US at 50. Hence, before court can impose sanctions against a lawyer under its inherent power, it must find that the lawyer's conduct "constituted or was tantamount to bad faith." Durrett v. Jenkins Brickyard, Inc., 678 F. 2d 911, 918 (11th Cir. 1982); see also Barnes v. Dalton, 158 F. 3d 1212, 1214 (11th Cir. 1998) ("the key to unlocking a court's inherent power is a finding of bad faith."). "A finding of bad faith

is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purposes of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." Barnes, 158 F. 3d at 1214 (internal quotations omitted).

Thus under the inherent powers doctrine, Appellees/Cross-Appellants bear the burden of producing clear convincing evidence that Appellant/Cross-Appellee engaged in a "fraud on the court" or actions constituted bad faith or respect to Cole's actions. However, the Bankruptcy Court specifically concluded that "there was no evidence presented that Cole's obstructive discovery conduct was Gwynn's fault, having either been carried out at Gwynn's directions, or upon Gwynn's advice. Absent evidence of Gwynn's culpability in advising Cole not to appear and testify at her deposition, or to otherwise not participate in discovery, there exist no basis pursuant to Bankruptcy Court 7037, or pursuant to any other authority to assess sanctions against Gwynn." Without clear and convincing evidence or any evidence of "fraud on the court" or other behavior working sanctions presented by Appellee/Cross-Appellants, the Bankruptcy Court would have not been able to exercise its inherent power to impose sanctions against Appellant/Cross-Appellee. Furthermore, the Bankruptcy Court's decision not to impose sanctions against Appellant/Cross-Appellee for Cole's action was not in error and with it in its discretion. Specifically, the Bankruptcy Court as the fact-finder had discretion to impose sanctions against Cole and not Appellant/Cross-Appellee given the facts in the record and its specific

factual findings. Thus, I conclude that the Bankruptcy Court did not err with regard to any of the Orders on cross-appeal and therefore I AFFIRM the Orders on Appellees/Cross-Appellants' cross-appeal.

V. Conclusion

For the following reasons:

It is hereby ORDERED AND ADJUDGED:

1) Appellant's "Motion to Supplement the Designation of Record on Appeal to Include Record Items from Dismissed Appeals Case No.: 06-80731 CIV-GOLD/TORRES, and Case No.: 06-80804 CIV-GOLD/TORRES" [DE # 15] is GRANTED.

2) Appellees/Cross Appellants' "Response to Appellant, Mary Alice Gwynn's Motion to Extend Allowed Pages of Initial Brief, Pursuant to Local Rule 87.4(E)(2) [D.E. 14]; Motion to Strike Appellant's Initial 34 Intentional Misrepresentations to the Court; and Motion for Sanctions Pursuant to this Court's Order Placing Parties on Notice That Court May Invoke Federal Rule of Civil Procedure 11 [D.E. 12] [DE # 23] is DENIED in its entirety. To the extend that Appellees' Motion seeks to oppose Appellant's Motion to Extend Allowed Pages of Initial Brief, this portion of the Appellees' Motion is DENIED as moot. To the extent that Appellees seek to strike Appellant's Initial Brief in part or Cole, such request is DENIED. To the extent that Appellees seek the Court to impose sanctions on Appellant for her alleged "misrepresentations" contained in her Initial Brief and in her Motion for Page Extension as well as for general

conduct during the course of this appeal, such request is DENIED.

3) I AFFIRM all of the Bankruptcy Court's Orders on appeal and cross-appeal.

4) this case is CLOSE.

DONE AND ORDERED in Chambers at Miami, Florida, this 14 day of March 2007.

Footnote

[1]Because Appellant conceded that all other Orders previously appealed were non-final Orders, I can use my discretion not to review these Orders.

No.

IN THE

Supreme Court of the United States

MARY ALICE GWYNN, PETITIONER

v.

JAMES F. WALKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SECOND SUPPLEMENTAL APPENDIX

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Filed 7/26/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-80121-CIV-GOLDITURNOFF

MARY ALICE GWYNNE, ESQUIRE, Appellant,
v.
JAMES F. WALKER, Appellee.

OMNIBUS ORDER, AFFIRMING ALL BANKRUPTCY ORDERS ON APPEAL, AND CLOSING CASE

This is an appeal from the following Order entered by the Bankruptcy Court for the Southern District of Florida on December 11, 2006 entitled "Order: 1) Granting In Part and Denying In Part Mary Alice Gwynn, Esquire's Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c)(1)(A), Pursuant to Bankruptcy Local Rule 8014-1(F)(1)(sic) [C. P. 1462]; and 2) Granting in Part and Denying In Part Debtor and Rotella's Emergency Motion to Strike and/or Dismiss Gwynn's Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as Prevailing Party Under Rule 9011 (c)(1)(A), Pursuant to Bankruptcy Local Rule 8014-1(F)(1) [C.P.1848]." For the reasons discussed below, I affirm all of the rulings of the Bankruptcy Court on appeal.

I. Background

These facts are gleaned from the record, the parties' submissions and the decision of the Bankruptcy Court in In re Walker, 2006 WL 3922113 (Bkrtcy, S.D. Fla.

2006). Debtor James F. Walker filed a petition for Chapter l bankruptcy relief on April 25, 2003. Attorney Gary J. Rotella ("Rotella") represented Debtor in the bankruptcy proceedings. Appellant Mary Alice Gwynn ("Appellant") represented Eleanor C. Cole and Florida Precision Calipers, Inc. in the bankruptcy proceedings. Ms. Cole and Florida Precision Calipers, Inc. were the two largest creditors in the bankruptcy. Appellant alleged that sometime after Debtor filed bankruptcy, Debtor's wife, Carol Ann Walker, transferred her interest in a piece of real property located in the Bahamas to Attorney Rotella.

On April 21, 2004, Appellant filed an "Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P.A. From Representing the Debtor." [Bankruptcy DE # 292]. Also on April 21, 2004, Attorney Rotella sent a Rule 9011 communication to Appellant indicating that he would seek Rule 9011 sanctions in connection with the Motion to Disqualify if it were not withdrawn. On April 26, 2004, Appellant filed Cole's Supplemental Memorandum of Law in Support of the Motion to Disqualify. Also on April 26, 2004, Attorney Rotella filed a "Motion to Shorten 21 Day Notice Period For Filing Motion for Sanctions Pursuant to Bankruptcy Rule 9011." [Bankruptcy DE # 321]. On April 28, 2404, the Bankruptcy Court heard oral argument and denied the Motion to Disqualify. The Bankruptcy Court found that as creditor, Cole lacked standing to assert on behalf of the Debtor's family, that Attorney Rotella had a potentially disqualifying interest. The Bankruptcy Court also heard and denied the Motion to Shorten on April 28, 2004.

On May 18, 2004, Appellant filed a "Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P.A." Also on May 18, 2004, the Rule 9011 Movants filed the Motion for Sanctions which sought attorneys' fees and costs incurred in connection with the Motion to Disqualify. At the hearing held on May 28, 2004, the Bankruptcy Court orally denied the Renewed Motion to Disqualify and the Bankruptcy Court found that the Renewed Motion to Disqualify was based on the same legal theory, which it previously found to be without merit. The Bankruptcy Court also orally granted the Motion for Sanctions against Appellant which had been based upon the original Motion to Disqualify that the Bankruptcy Court denied on April 28, 2004. The Bankruptcy Court's ruling awarding Appellee sanctions was memorialized in the Court's June 15, 2004, "Order Granting Motion for Sanctions Pursuant to Rule 9011." [Bankruptcy DE # 437]

A hearing was held on April 21, 2005 to liquidate the amount of sanctions awarded by the June 15, 2004 Order. On May 11, 2005, the Bankruptcy Court entered a "Final Judgment and an Order Awarding Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011." [Bankruptcy DE# 881] The Bankruptcy Court imposed sanctions against Appellant in the amount of $80,572.50. Thereafter, Appellant filed a Notice of Appeal of that Order on May 20, 2005. [Bankruptcy DE # 911].

On March 20, 2006, I entered an Order Vacating Final Judgment of Bankruptcy Court in the appeal styled Mary Alice Gwynn v. James F. Walker, Lead Case No. 05-80714-CIVGOLD/TURNOFF consolidated with

Case No. 05-80715-CIV-GOLD/TURNOFF. In that Order, I determined, among other things, that the Bankruptcy Court's imposition of Rule 9011 sanctions was inappropriate because the underlying Motion to Disqualify had been denied by the Bankruptcy Court prior to the Rule 9011 Movants filing their Motions for Sanctions. After I entered my March 20, 2006 Order, Appellant filed her "Motion for Bankruptcy and Appellate Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c)(1)(A) Pursuant to Bankruptcy Local Rule 80141 (F)(1)(sic)" along with a Summary of Fees and Costs in the Bankruptcy Court. [Bankruptcy DE # 1462 and 1465]. On October 23, 2006, Appellant filed an Amended Summary of Fees and Costs. [Bankruptcy DE # 1795]. On October 25, 2006, the Bankruptcy Court conducted a telephonic hearing on the Appellee's "Debtor and Gary Rotella's Emergency Motion to Strike and/or Dismiss Gwynn's Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party under Rule 9011 (c)(1)(A) Pursuant to Bankruptcy Local Rule 8014-1(F)(1)," [Bankruptcy DE # 1857] during which the Bankruptcy Court denied the Appellant's Motion for any fees concerning the appeal.

On November 2, 2006, Appellant filed an "Updated and Revised Summary of Fees and Costs." On November 6, 2006, the Bankruptcy Court conducted an evidentiary hearing on the Appellant's "Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c)(1)(A) and Pursuant to Bankruptcy Local Rule 8014-1(F)(1)." On December 11, 2006, the Bankruptcy Court issued its "Order Denying Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing

Party Under Rule 9011 (c)(1)(A) and Pursuant to Bankruptcy Local Rule 8014-1 (F)(1)," which is the subject of this appeal. In that Order, Bankruptcy Court concluded that Appellant was not a "prevailing party" because she did not prevail in the Bankruptcy Court either in prosecuting the underlying Motion to Disqualify or in opposing the Motion for Sanctions. Additionally, the Bankruptcy Court held that it did not have jurisdiction under Rule 9011 to award attorney's fees incurred on appeal. Moreover, the Bankruptcy Court held "[e]ven if an award of attorney's fees and costs to [Appellant] were appropriate, the Court would not exercise its discretion to make such an award given [Appellant's] unprofessional conduct in this case." Lastly, the Bankruptcy Court found that Appellant was entitled to $1,591.58 in costs pursuant to Bankruptcy Rule 8014.[1]

On December 19, 2006, Appellant filed her Notice of Appeal of the Court's "Order Denying Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011(c)(1)(A) and Pursuant to Bankruptcy Local Rule 8014-1(F)(1)." The appeal of this Order was fully briefed by the parties and is now ripe for review.

II. Standard of Review

In essence, Appellant takes issue with both the Bankruptcy Court's rulings with regard to Rule 9011 sanctions and the amount of costs awarded under Local Rule 8014-1 (F)(1). "When reviewing the imposition of sanctions, the primary question before us is whether the sanctioning court abused its discretion." In re: Mroz, 65 F. 3d 1567, 1571 (11th Cir.1995); see also Kaplan v.

DaimlerChrysler, 331 F.3d 1251, 1255 (111 th Cir. 2003); In re Suncoast Airlines, 188 B. R. 56, 58 (S.D. Fla. 1994). An abuse of discretion occurs where a court "misapplies the law in reaching its decision or bases its decision on findings of fact that are clearly erroneous." Arce v. Garcia, 434 F.3d 1254, 1260 (11 th Cir. 2006). The award of sanctions appealed in this case was awarded under Bankruptcy Rule of Procedure 9011. "Bankruptcy Rule 9411 is substantially identical to Federal Rule of Civil Procedure 11." Id. at 1572. Where a court enters an award of sanctions as a penalty for the filing of a frivolous pleading, the court should "only focus on the merits of the pleading gleaned from the facts and law known or available to the attorney at the time of filing." Id. (citing Jones v. Intern'l Riding Helmets, Ltd., 49 F.3d at 694-95).

In a bankruptcy appeal, the district court functions as an appellate court in reviewing the bankruptcy court's decision. See In re Sublett, 895 F. 2d 1381,1383-84 (11th Cir.1990) (citing 28 U.S.C. §158(a), (c)}. In this capacity, district courts must give considerable deference to a bankruptcy court's findings of fact, and will not overturn its factual findings unless it determines that those findings are clearly erroneous. See In re Chase & Sanborn Corp., 904 F. 2d 588, 593 (11th Cir. 1990); In re Pepenella, 103 B. R. 229, 300 (M. D. Fla. 1988). Conclusions of law made by bankruptcy courts are reviewed de nova. See Sublett, 895 F.2d at 1383.

III. Legal Analysis

Appellant argues that the Bankruptcy Court erred in three significant ways. Specifically, Appellant argues that: 1) the Bankruptcy Court erred as a matter of law

in deciding that Appellant was not the prevailing party under Rule 9011(c)(1)(A); 2) that the Bankruptcy Court erred as a matter of law in its finding that the Court did not have jurisdiction to award appellate fees pursuant to Rule 9011; and 3) that the Bankruptcy Court erred as a matter of law in finding that pursuant to Bankruptcy Rule 8014 that the Appellant was entitled to tax costs but not to reasonable expenses. In Response, Appellee argues that Appellant was not the prevailing party relative to the Rule 9011 Motion; that the sanctions awarded pursuant to Bankruptcy Rule 9011 are completely discretionary; that the Bankruptcy Court properly found that it lacked jurisdiction to award Appellant appellate fees and expenses related to the Rule 9011 Motion; and that Appellant is not entitled to all costs and expenses listed in her summary. I agree with the Appellee on all of these points.

With regard to Appellant's first argument, I conclude that Appellant's argument that she is a "prevailing party" under Rule 9011 to be without merit. Appellant's argument is based on a faulty premise. Rule 11 is not a fee-shifting statute and, as such, the term "prevailing party" has no relevance to Rule 11 and/or Rule 9011. With regard to Appellant's second argument, I conclude that Appellant's argument that Rule 9011 mandated the award of sanctions against Appellee based on this Court's prior reversal of the Bankruptcy Court's imposition of Rule 9011 sanctions against her to be also without merit because it is well-established that the imposition of both Rule 9011 and Rule 11 sanctions are awarded on a discretionary, not mandatory, basis.

The United States Supreme Court in Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,

498 U.S. 533, 552-553 (1991) addressed these two issues and stated in relevant part:

> Petitioner's challenges do not clear these substantial hurdles. In arguing that the monetary sanctions in this case constitute impermissible fee shifting, Business Guides relies on the Court's statement in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616-17, 44 L.Ed.2d 141 (1975), that, in the absence of legislative guidance, courts do not have the power "to reallocate the burdens of litigation" by awarding costs to the losing party in a civil rights suit; they have only the power to sanction a party for bad faith. See id., at 258-259, 95 S.Ct., at 1622-1623. The initial difficulty with this argument is that Alyeska dealt with the courts' inherent powers, not the Rules Enabling Act. Rule 11 sanctions do not constitute the kind of fee shifting at issue in Alyeska. Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful at least well founded. Nor do sanctions shift the entire cost of litigation: they shift only the cost of a discrete event. Finally, the Rule calls only for "an appropriate sanction"-attorney's fees are not mandated. As we explained in Cooler & Gell: " Rule 11 is not a fee-shifting statute .... `A movant under Rule 11 has no entitlement to fees or an other sanction.' " 496 U.S., at 409, 110 S.Ct., at 2462. (emphasis added and internal citation omitted).

Thus, Appellant's argument that she is entitled to her attorneys' fees as the purported "prevailing party" on an appeal ignores the fact that sanctions pursuant to Rule 9011 are discretionary, even if the term "prevailing party" was applicable to Rule 9011. The plain language of Rule 9011 states in relevant part: "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Accordingly, even if the Appellant was in fact the "prevailing party" relative to the Rule 9011 Motion in the Bankruptcy Court (which she was not), the Bankruptcy Court had discretion not to award her attorney's fees and expenses because Rule 9011 is not a "fee-shifting" rule or statute. In fact in its December 11, 2006 Order, the Bankruptcy Court determined that it would not exercise its discretion to award Appellant any attorneys' fees and/or costs pursuant to Rule 9011 given Appellant's prior conduct.

In relevant part, the Bankruptcy Judge stated:

> In this case, the Motion for Sanctions was triggered by [Appellant's] frivolous pleading. [Appellant's] filing of Cole's Motion to Disqualify was unwarranted under existing law because Cole lacked standing to assert a conflict of interest on behalf of members of Debtor's family... Even if an award of attorney's fees and costs to [Appellant] were appropriate, the Court would not exercise its discretion to make such an award given [Appellant's] unprofessional conduct in this case.

Given the clear case law on Rule 11 and Rule 9011, I conclude that the Bankruptcy Court did not err as a matter of law when it determining that Appellant was not the "prevailing party." Nor did the Bankruptcy Court abuse its discretion when it concluded that Appellant was not entitled on a discretionary basis to any attorney's fees and expenses pursuant to Rule 9011.[2]

While Bankruptcy Rule 9011 does not provide for appellate attorney's fees, Bankruptcy Rule 8014 does provide for taxation of certain appellate costs. Rule 8014 states in pertinent part:

> Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

Bankruptcy Rule 8014 does not refer to the taxation of costs in favor of the prevailing party. However, Rule 8014 states that, as a general rule, costs "shall be taxed against the losing party on an appeal."

With regard to Rule 8014, Appellant argues that "[s]ince the Bankruptcy Court denied the Appellant's Motion for reasonable fees and reasonable costs under Rule 9011(c)(1)(A) as the prevailing party, the Court awarded taxable costs under the limited scope of Rule 8014."

(Appellant's Initial Brief, 24), Consequently, Appellant argues that the Bankruptcy Court should have awarded her reasonable expenses as well as costs that were incurred as a result of opposing the Rule 9011 sanctions motion and the resulting appeal in this Court. Appellee does not raise any challenge to the Bankruptcy Court's taxation of costs.

In this case, the Bankruptcy Court stated in relevant part:

> Gwynn's Third Summary of fees and costs seeks taxation of $5,961.44 in appellate costs. The Court finds it appropriate to tax only the appellate costs listed in Rule 8014 and Part IX "Appellate Costs" of the Court's Guideline for Taxation of Costs by the Clerk "Guidelines") that were necessary for the prosecution of [Appellant's] appeal.

In rendering its decision in taxing costs and expenses, the Bankruptcy Court examined each of Appellant's alleged costs and expenses in turn and concluded that Appellant was only entitled to $1,591.59 out of the $5,961.44 costs and expenses demanded. In taxing costs, the Bankruptcy Court based its decision upon its close review of Bankruptcy Rule 8014 and Part IX "Appellate Costs" of the Court's Guideline for Taxation of Costs by the Court. Specifically in its Order, the Bankruptcy Court addressed each of Appellant's itemized alleged expenses line-by-line in pages 13-16 of its Order and I am satisfied that it provided sufficient justification for his decision to exclude certain expenses and to grant other costs. Thus, I conclude that the Bankruptcy Court's decision to tax appellate costs in

the amount of $1,591.58 against Rotella, Rotella P.A., and the Debtor, jointly and severally, pursuant to Rule 8414 was not clearly erroneous or without basis in law.[3]

IV. Conclusion

For the reasons stated above,

It is hereby ORDERED AND ADJUDGED that:

1) I AFFIRM all portions of the Bankruptcy Court's Orders on appeal. Thus, Appellant's request to remand this matter back to Bankruptcy Court for an evidentiary hearing is DENIED.

2) I DENY Appellee's counsel attorneys' fees and costs pursuantto Bankruptcy Rule 8020.[4] With regard to Appellee's argument that I sanction Appellant for alleged misrepresentations of both fact and law, I decline to exercise m discretion to impose an such sanctions for an alleged conduct.

3) The Clerk of Court is directed to CLOSE this matter.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of July 2007.

Footnotes

[1]In its conclusion, the Bankruptcy Judge stated:

> The Court does not find it warranted pursuant to Rule 9011(c)(1)(A) to award attorney's fees and costs to [Appellant] for opposing the Motion for

> Sanction in this Court. In addition, Rule 9011(c)(1)(A) does not provide authority for this Court to consider a request for appellate attorney's fees incurred before the District Court. The Court does, however, find it appropriate to tax appellate costs in the amount of $1,591.58 against Rotella, Rotella P.A., and the Debtor, jointly and severally, pursuant to Rule 8014.

[2]Appellant's argument that the Bankruptcy Court erred in finding that it did not have jurisdiction to award appellate fees is also without merit. Also, the Bankruptcy Court's reliance on In re. George Schumann Tire & Battery Co., 106 B. R. 296 (Bankr. M. D. Fla. 1986) was well-placed. In In re: George Schumann Tire & Battery Co., a bankruptcy court held that Bankruptcy Rule 9011 governs only the initial proceeding in a bankruptcy court and not appeals pending in the district court.

In relevant part, the court in In re: George Schumann Tire & Battery Co. noted:

> This Court is not oblivious of the case of In re Jacobson, 47 B.R. 476 (D.C.1985) decided by the bankruptcy court for the District of Colorado where the bankruptcy court used Fed. R.Civ.P.11 as a basis for imposition of sanctions in connection with an appeal. It appears clearly from the decision, however, that the bankruptcy court failed to make a distinction between Fed.R.Civ.P.11 and Bankruptcy Rule 9011 and since the Motion to impose sanctions was sought

under both Rules, the imposition of sanctions might have been proper.

In re: George Schumann Tire & Battery Co., 106 B. R. at 298.

In this case, Appellant's Motion requested attorney's fees only under Bankruptcy Rule 9011, not Rule 11. Thus, I conclude that the Bankruptcy Court did not err when it concluded that Bankruptcy Rule 9011 does not authorize awarding appellate attorney's fees incurred in proceeding before the District Court.

[3] In its Response Brief, Appellee argues Appellant blatantly misrepresented the record in footnote 1 of her Initial Brief. In relevant part, Appellee argues "[Appellant] intentionally attempts to suggest that undersigned engaged in misconduct and deceit in the Bankruptcy Court." Similar, personal attacks were present in Appellant's briefs. While I refrain from awarding sanctions against either party in this case, I note that both parties' behavior in this appeal, as well as the numerous other appeals I have had before me over past two Years has been less than professional and bordered on sanctionable behavior.

[4] Bankruptcy Rule 8020 provides, "if a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may ... award just damages and single or double costs to the appellee." The language of Bankruptcy Rule 8020 , in relevant part, is identical to that of Federal Rule of Appellate Procedure 38 ("Appellate Rule 38"), and therefore, a court considering a Bankruptcy Rule 8020 motion should be guided by

cases applying Appellate Rule 38. The purpose for sanctions under Appellate Rule 38 is to "compensate appellees who are forced to defend judgments awarded them in the trial court from appeals that are wholly without merit." Nagle v. Alspach, 8 F.3d 141,145 (3rd Cir.1993). The analysis is purely objective, limited to a focus on the merits of the appeal and "regardless of [the appellant's] good or bad faith." Id. (quotation omitted). However, a court must exercise caution in awarding damages under Appellate Rule 38 because imprudent awards may "chill" parties' desire to appeal difficult and novel questions. Hillman Co. (V.I.) Inc. v. Hyatt Intern., 899 F.2d 250, 253 (3rd Cir.1990). Therefore, a court should not award damages unless the appeal "lacks colorable support." Nagle, 8 F.3d at 145. In light of this standard, I conclude that Appellant has presented arguments that are not entirely without "colorable support." Thus, I conclude that Appellant's arguments are minimally sufficient to warrant the denial of Appellee's motion for damages and costs for this appeal.

Filed 12/12/2006
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division
CASE NO: 03-32158-BKC-PGH Chapter 7 Proceedings

IN RE JAMES F. WALKER, Debtor.

ORDER: 1) GRANTING IN PART AND DENYING IN PART MARY ALICE GWYNN, ESQUIRE'S MOTION FOR BANKRUPTCY AND APPELLATE COURT ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY UNDER RULE 9011 (c) (1) (A), PURSUANT TO BANKRUPTCY LOCAL RULE 8 014 -1(F) (1) (sic) [C. P. 1462] ; AND 2)GRANTING IN PARY AND DENYING IN PART DEBTOR AND ROTELLA'S EMERGENCY MOTION TO STRIKE AND/ OR DISMISS GWYNN'S MOTION FOR BANKRUPTCY AND APPELLATE COURT ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY UNDER RULE 9011 (c) (1) (A) , PURSUANT TO BANKRUPTCY LOCAL RULE 8014-1(F) (1) [C. P.1790]

THIS MATTER came before the Court for hearing on October 25, 2006 and on November 2, 2006 upon Mary Alice Gwynn, Esquire's ("Gwynn") Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c) (1) (A) , Pursuant to Bankruptcy Local Rule 8014-1 (F) (1) (sic) [C. P.1462] ("Motion") and upon James F. Walker' s ("Debtor") and Gary J. Rotella, Esquire's ("Rotella") Emergency Motion to Strike and/or Dismiss [Gwynn's Motion] [C. P. 1790] ("Motion to Dismiss"').

On April 18, 2006, Gwynn filed both her Motion and a Summary of Fees and Costs [C. P. 1465] ("First Summary") . The Motion argues that as the prevailing party under Bankruptcy Rule 9011(c) (1) (A) , Gwynn is entitled to attorney's fees and costs incurred in this Court, as well as attorney's fees and costs incurred in District Court for her appeal of this Court's award of sanctions pursuant to Debtor, Rotella, and Gary J. Rotella & Associates, P.A.'s ("Rotella P.A.") (collectively the "Rule 9011 Movants") Motion for Sanctions Against Mary Alice Gwynn, Esquire and Creditor Eleanor C. Cole Pursuant to Bankruptcy Rule 9011 [C. P.360] ("Motion for Sanctions") . Gwynn's First Summary sought $99,721.98 in total fees and costs for both the proceedings in this Court and for her appeal to the District Court. Pursuant to the Court's Order Specially Resetting Hearing [C.P.1757], on October 23, 2006 Gwynn filed an Amended Summary of Fees and Costs ("Second Summary") [C . P .17 95] in which the total fees and costs sought by Gwynn for the proceedings in this Court and in the District Court had increased to $104,981.84. On November 2, 2006, Gwynn filed an Updated and Revised Summary of Fees and Costs Pursuant to the Court's Ruling On October 25, 2006 ("Third Summary") [C. P .1822] . Pursuant to the Court' s oral ruling of October 25, 2006 which is discussed below, Gwynn's Third Summary deleted appellate attorney's fees from the amount sought. Thus, Gwynn' s Third Summary sought $35, 500. 00 in paralegal and attorney' s fees incurred in this Court, and $5,961.44 for appellate costs.

BACKGROUND

The Debtor filed for protection under Chapter 7 of the Bankruptcy Code on April 25, 2003. Eleanor C. Cole ("Cole") filed a claim against the Debtor's bankruptcy estate based upon a final judgment she received against the Debtor in State Court. The Court's docket reflects that Gwynn represented Cole in this case from July 17, 2003 until June 9, 2004. On April 21, 2004 Gwynn filed Cole's Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P. A. From Representing the Debtor [C . P . 2 92] ("Motion to Disqualify"). Also on April 21, 2004, Rotella sent a Rule 9011 communication to Gwynn indicating that he would seek sanctions in connection with the Motion to Disqualify if it were not withdrawn. On April 26, 2004, Gwynn filed Cole's Supplemental Memorandum of Law in Support of [the Motion to Disqualify] [C. P. 311] ("Supplemental Memorandum"). Also on April 26, 2004, Rotella filed the Rule 9011 Movants' Motion to Shorten 21 Day Notice Period For Filing Motion for Sanctions Pursuant to Bankruptcy Rule 9011 [C. P. 321] ("Motion to Shorten"). On April 27, 2004, the Rule 9011 Movants filed a Response to [Motion to Disqualify] [C. P.318] ("First Response"). Also on April 27, 2004, the Rule 9011 Movants filed a Response to [the Supplemental Memorandum] [C.P. 317] ("Second Response"). On April 28, 2004, the Court heard oral argument and denied the Motion to Disqualify. Among other things, the Court found that as a creditor, Cole lacked standing to assert on behalf of members of Debtor's family, that Rotella had a potentially disqualifying conflict of interest. The Court also heard and denied the Motion to Shorten on April 28, 2004.

On May 18, 2004, Gwynn filed a Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Assocates

P.A. ("Renewed Motion to Disqualify") [C. P. 361] Also on May 18, 2004, the Rule 9011 Movants filed the Motion for Sanctions which sought attorneys' fees and costs incurred in connection with the Motion to Disqualify. At a hearing held May 28, 2004, the Court orally denied the Renewed Motion to Disqualify. The Court found that the Renewed Motion to Disqualify was based upon the same grounds contained in the original Motion to Disqualify which the Court had already denied for lack of standing. The added grounds in the Renewed Motion to Disqualify, having been based on a dismissed adversary proceeding, were determined to be moot. The Court then orally granted the Motion for Sanctions against Gwynn which had been based upon the original Motion to Disqualify that the Court denied on April 28, 2004. The Court's ruling was memorialized in the Court's June 15, 2004, Order Granting Motion for Sanctions Pursuant to Bankruptcy Rule 9011 [C.P. 437] ("June 15, 2004 Order") .

Ten months later, on April 6, 2005, Gwynn filed a Motion to Amend, Correct or withdraw the Court's Order Granting Debtor's Motion for Sanctions Pursuant to Rule 9011 Dated June 15, 2004 and Rule 60 Federal Rules of Civil Procedure [C. P. 793] ("Rule 60(b) Motion") Which the Court denied on April 8, 2005. See Order Denying Gwynn's Motion to Amend, Correct or withdraw the Court's Order Granting Debtor's Motion for Sanctions Pursuant to Rule 9011 Dated June 15, 2004 and Rule 60 Federal Rules of Civil Procedure [C . P . 799] ("Order Denying Rule 60(b) Motion""). Also on April 6, 2005 Gwynn filed a Motion to Strike or Dismiss Debtor's [Motion for Sanctions] for Failure to Abide by Rule 11 [C.P. 792] ("Motion to Dismiss"). On April 8, 2005 the Court entered an Order Denying Gwynn's

[Motion to Dismiss] [C.P. 801]. On April 18, 2005, Gwynn filed Notice of Appeal No. 818 [C. P. 818] wherein she appealed both the Order Denying Rule 60(b) Motion and the Order Denying Gwynn's Motion to Dismiss. A hearing was held on April 21, 2005 to liquidate the amount of sanctions awarded by the June 15, 2004 Order. On May 11,2005, the Court entered a Final Judgment [C. P. 876] and an Order Awarding Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 [C. P. 8811 (collectively with the June 15, 2004 Order, the "Orders Awarding Rule 9011 Sanctions") which imposed sanctions against Gwynn in the amount of $80,572.50. Gwynn filed Notice of Appeal No. 911 [C.P.911] on May 20, 2005 appealing the Orders Awarding Rule 9011 Sanctions.[1]

On March 20, 2006, the Honorable Alan S. Gold, United States District Court Judge, entered an Order Vacating Final Judgment of Bankruptcy Court (the "District Court Order") in the appeal styled Mary Alice Gwynn v. James F. Walker (In re James F. Walker), in the United States District Court for the Southern District of Florida, Lead Case No.05-80714-Civ-Gold/Turnoff consolidated with Case No. 05-80715-Civ-Gold/Turnoff. The District Court Order determined that imposition of Rule 9011 sanctions was inappropriate because the underlying Motion to Disqualify had been denied by this Court prior to the Rule 9011 Movants filing their Motion for Sanctions. See District Court Order [C. P. 1415].

Gwynn subsequently filed the instant Motion seeking prevailing party fees and costs pursuant to Bankruptcy Rules 9011 and 8014.

CONCLUSIONS OF LAW

A. Bankruptcy Court Fees and Costs

Bankruptcy Rule 9011(c) (1) (A) states in pertinent part

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) . It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

Bankruptcy Rule 9011(c) (1) (A) (emphasis added).

Gwynn' s Motion argues that she is the prevailing party and as such is entitled to an award of attorney's fees and costs incurred in opposing the Motion for Sanctions. The Court notes at the outset that Gwynn did not prevail in this Court either in prosecuting the underlying Motion to Disqualify or in opposing the Motion for Sanctions. The two cases cited by Gwynn in support of her argument are readily distinguished from the facts of this matter. In Gulf Coast Orthopedic

Center, 297 B.R. 861 (Bankr. M. D. Fla. 2003) the Rule 9011 motion against counsel was found to be without merit. However significantly and unlike this case, said counsel also prevailed on the underlying substantive motion. Id. at 865. In Kirk-Murphy Holding, Inc., 313 B.R. 918 (Bankr. N.D. Fla. 2004) the Court awarded fees pursuant to Rule 9011 (c) (1) (A) because of the subject Rule 9011 motion's procedural defects. The Kirk-Murphy court found that "[t]he alleged debtor's warning letter did not serve as a substitute for a motion, service of the motion is the requirement imposed by Bankruptcy Rule 9011." Id. at 923. Unlike Kirk-Murphy, in this case the Motion for Sanctions was served on Gwynn twenty-one days prior to its being filed with the Court. Indeed, Rotella filed Debtor's Motion to Shorten (the twenty-one day notice period under Rule 9011) which the Court denied. Althcugh the motion for reconsideration upon which the Kirk-Murphy Rule 9011 motion had been based was denied, the opinion offers no hint of whether the underlying motion for reconsideration was frivolous or unwarranted.

In this case, the Motion for Sanctions was triggered by Gwynn's frivolous pleading. Gwynn"s filing of Cole's Motion to Disqualify was unwarranted under existing law because Cole lacked standing to assert a conflict of interest on behalf of members of Debtor's family. Nevertheless after the Motion to Disqualify was denied, Gwynn filed a Renewed Motion to Disqualify which restated the same grounds and some additional grounds that were moot. The Debtor and Rotella were compelled to file two Responses and Rotella was compelled to appear in this Court to defend both the Motion to Disqualify and the Renewed Motion to

Disqualify. In prosecuting the Motion to Disqualify and the Renewed Motion to Disqualify, Gwynn endeavored to prove, albeit unsuccessfully, that the motions were warranted and not frivolous. Gwynn's efforts prosecuting the Motion to Disqualify and the Renewed Motion to Disqualify were in essence the same effort required for her defense of the Motion for Sanctions. The Rule 9011 Movants on the other hand incurred unnecessary costs because they were compelled to respond to Gwynn' s frivolous pleadings. The Court is mindful that 'the central purpose of Rule [9011] is to deter baseless filings. . . any interpretation must give effect to the Rule's central goal of deterrence."[2] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 S. Ct. 2447, 2454 (1990). Gwynn filed the baseless Motion to Disqualify and Renewed Motion to Disqualify in this case, the other side was compelled to respond and to make an appearance before the Court. An award of attorney's fees in favor of Gwynn would reward, not deter, Gwynn' s baseless filings. Thus the Court finds that an award of attorney's fees and costs to Gwynn pursuant to Rule 9011 (c) (1) (A) is unwarranted.[3]

Even if an award of attorney's fees and costs to Gwynn were appropriate, the Court would not exercise its discretion to make such an award given Gwynn's unprofessional conduct in this case.[4] See e.g., Memorandum Order [C.P.1472]; Order: 1) Denying Mary Alice's Gwynn's Motion for Rehearing and Reconsideration of the Court's Sua Sponte Order Directing Mary Alice Gwynn, Esq. , to Stop Filing Notices of Filing; 2) Imposing Sanctions; and 3) Striking Court Paper Nos. 1529 and 1530 [C. P. 1550] ; Order Denying Requested Relief in Mary Alice Gwynn 's Response to Debtor's Emergency Motion for

Extension, Continuance and Modification of Ruling Dated May 26,2006 [C. P. 1576] ; Order: 1) Denying Mary Alice's Gwynn's Motion for Rehearing and Reconsideration of this Court's "Order Denying... Requested Relief in Mary Alice Gwynn's Amended Reply" (D.E. # 1602) Dated June 27, 2006 [C. P. 1633]; 2) Denying Relief Requested in Mary Alice Gwynn's Supplement to Her Motion for Rehearing. [C.P. 1642]; and 3) Denying Mary Alice Gwynn's Motion for Evidentiary (Sic) on All the Issues Raised ... [C. P.1641] [C. P.1644] ; and Order on Order to Show Cause [C. P.1553] .

B. District Court Appellate Fees and Costs

1. Bankruptcy Rule 9011 Does Not Provide for Attorney's Fees Incurred on Appeal

On October 25, 2006, the Court heard Debtor and Rotella's Motion to Dismiss. Rotella argued that based upon the Order on Order to Show Cause having prohibited Gwynn from representing any parties before this Court until she completed the required qualifications to practice, Gwynn's prosecution of her Motion was tantamount to her unlicensed practice of law. See Order on Order to Show Cause [C.P.1553]. The Court denied this portion of the Motion to Dismiss because the Court's prohibition was limited to Gwynn representing other parties, she was not prohibited from representing her own interests in this Court. The Motion to Dismiss also argued that Gwynn had presented no legal authority that would allow this Court to award attorney's fees incurred in connection with an appeal to District Court. The Court construed this portion of Debtor and Rotella's Motion to Dismiss

as a motion in limine concerning evidence on appellate fees, and the Court agreed that the Bankruptcy Court is not the proper forum to consider Gwynn's request for an award of appellate attorney's fees pursuant to Rule 9011. "Bankruptcy Rule 9011 governs only the initial proceeding in a bankruptcy court and not appeals pending in the district court." In re George Schumann Tire & Battery Co., 106 B.R. 296, 298 (Bankr. M.D. Fla. 1989). As the Supreme Court explained, "Rule [9011] is not a fee-shifting statute, the policies for allowing district courts to require the losing party to pay appellate, as well as district court attorney's fees, are not applicable."' Cooter & Gell v. Hartmarx Corp., 496 U.S. at 408. "On its face, Rule [9011] does not apply to appellate proceedings. . Rule [9011] is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level." Id. at 406. Thus, Bankruptcy Rule 9011 does not authorize this Court to award appellate attorney's fees incurred in proceedings before the District Court.

Gwynn opposed the Motion for Sanctions in this Court, she appealed this Court's Orders before the District Court. Appeals to the District Court in bankruptcy cases are governed by Part VIII of the Bankruptcy Rules. Part VIII of the Rules does not contain any version of Bankruptcy Rule 9011. George Schumann, 106 B.R. at 299. Therefore, the Court denies Gwynn's request for an award of appellate attorney's fee without prejudice to her seeking such relief in the proper tribunal.

2. Bankruptcy Rule 8 014

While Bankruptcy Rule 9011 does not provide for appellate attorney's fees, Rule 8014 does provide for taxation of certain appellate costs. Rule 8014 states in pertinent part:

> Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

B.R. 8014.

In this matter, the District Court vacated this Court's Orders Awarding Rule 9011 Sanctions. Therefore pursuant to Rule 8014, taxation of costs is allowed only as ordered by the Court. Rotella's Written Opening Statement for November 2, 2006 Hearing [C. P.1820] ("Opening Statement") argues that Gwynn failed to file either a Bill of Costs or a Motion for Fees and Costs Not Taxable By Clerk within 30 days after entry of order of the District Court as required by Local Rule 8014-1(C) and (F). See Opening Statement Pars. 14-16. The District Court Order was entered on March 20, 2006. Gwynn filed both her Motion and her First Summary on April 18, 2006. Thus her filing was timely pursuant to Local Rule 8014-1. Although Gwynn once again failed to use the Local Form "Bill of Costs", the Local Rule requires only that her submission substantially conform to the Local Form. See Local Rule 8014-1 (B) . While Gwynn' s submission does not contain the Local Form Bill of Costs' declaration, the Court finds that her Motion and First Summary were

timely filed and that these submissions contain the substantive information required to be set forth in a Bill of Costs.

Gwynn"s Third Summary of fees and costs seeks taxation of $5,961.44 in appellate costs. The Court finds it appropriate to tax only the appellate costs listed in Rule 8014 and in Part IX "Appellate Costs" of the Court's Guidelines for Taxation of Costs by the Clerk ("Guidelines")that were necessary for the prosecution of Gwynn's appeal. Gwynn' s Third Summary lists the following costs.

1. Consulting attorney's fees (Norman Schroeder, Esq.) $1,000

As discussed above the Court is without authority to award attorney's fees for proceedings before the District Court. In addition, Part IX of the Guidelines do not provide for taxation of consulting attorney's fees.

2. Court Reporter fees for necessary transcripts $2,044.76

At the November 2, 2006 hearing, the Court directed Gwynn to file a written statement explaining why each transcript listed in her Third Summary was necessary for prosecution of her appeal. On November 13, 2006, Gwynn filed a Detailed List of Transcripts Ordered and Explanation of Necessity for Charge Pursuant to this Court's Instructions [C.P. 1827] ("Transcript List] with copies of the transcript invoices attached thereto. On November 24, 2006, Rotella filed Debtor's Response to [Transcript List] [C. P. 1836] in which Rotella maintained that none of the listed transcripts was

necessary for the appeal. In reviewing the parties' submissions, the Court finds that the transcripts for the 4/16/04 hearing and for Rotella's 5/21/04 deposition were not necessary for Gwynn's appeal. As to the remaining transcripts, the Court notes that the Court heard several matters on each of the days indicated. Thus some portions, but not all, of the 4/28/04, 5/28/04, and 4/21/05 transcripts were relevant and necessary for the appeal. The Court finds that the portion of the 4/28/04 transcript dealing with Rotella's Motion to Shorten and that the portion of the 5/28/04 transcript dealing with Rotella's request for sanctions would be necessary for the appeal. However, the Court finds that the portion of the 5/28/04 transcript dealing with Gwynn's Renewed Motion to Disqualify was unnecessary despite Gwynn's argument that the transcript was needed to show the District Court that the Renewed Motion to Disqualify was not frivolous. See Transcript List Par. 5. The District Court's Order was based upon the fact that the Motion for Sanctions was filed after the Court ruled upon the Motion to Disqualify. The District Court's Order did not consider the substantive merits of the Renewed Motion to Disqualify. Therefore it is not appropriate to tax the cost of that portion of the 5/28/04 transcript that deals with the Renewed Motion to Disqualify. In contrast, that portion of the 4/21/05 hearing dealing with liquidating the amount of sanctions would be taxable. The Court notes that the invoices supplied by Gwynn indicate that the transcripts were ordered on an expedited basis. The Court does not find that expedited processing of the transcripts was necessary for the appeal. Thus, based upon Gwynn's submissions, the Court is unable to determine the unexpedited cost of the allowable portions of the 4/28/04. 5/28/04 and 4/21/05

transcripts. Therefore the Court is denying without prejudice Gwynn's request for taxation of transcript costs.

3. Copies by Judicial Research for Designation of Items $428.83 Copy costs for production of copies of items designated on appeal as required by Bankruptcy Rule 8006 are taxable appellate costs pursuant to the Guidelines. At the November 2, 2006 hearing Rotella requested, and Gwynn agreed to within ten days provide statements to Rotella that had not been provided to him previously. The Court, noting that Rotella has made no specific objection to this item, finds that this is an allowable taxable appellate cost in the amount of $428.83.

4. Filing fee for 2 Notices of Appeal[818 & 911] $510.00

The Court finds that these appellate filing fees are allowable taxable appellate costs in the amount of $510.00.

5. Travel Expenses to Miami for Oral Argument $192.00

The Guidelines do no provide for taxation of these costs and therefore the Court finds that they are not taxable.

6. Recording fees for removal of Judgment Lien $233.50 The Court finds this to be an appropriately taxable cost of $233.50 because it is a cost in the nature of discharging bond premiums which are provided for in the Guidelines.

7. Copies of Initial Brief and Appendix and Reply $419.25

Copy costs for production of appellate briefs and appendices required are taxable appellate costs pursuant to the Guidelines. The Court, noting that Rotella has made no specific objection to this item, finds that it is an allowable taxable appellate cost in the amount of $419.25.

8. PACER document retrieval and Westlaw fees $79.10

The Guidelines do no provide for taxation of these costs.

9. Expert Witness Fee (Julianne Frank, Esq.) $1000.00

The Guidelines do no provide for taxation of these costs.

As detailed above, the Court finds that appellate costs incurred by Gwynn in the amount of $1,591.58 are taxable against
Rotella, Rotella, P.A., and the Debtor, jointly and severally,' pursuant to Rule 8014 and Part IX of the Court's Guidelines for Taxation of Costs by the Clerk.

CONCLUSION

The Court does not find it warranted pursuant to Rule 9011 (c) (1) (A) to award attorney's fees and costs to Gwynn for opposing the Motion for Sanctions in this Court. In addition, Rule 9011 (c) (1) (A) does not provide authority for this Court to consider a request for appellate attorney's fees incurred before the District Court. The Court does, however, find it appropriate to tax appellate costs in the amount of

$1,591.58 against Rotella, Rotella P.A., and the Debtor, jointly and severally,[5] pursuant to Rule 8014.

ORDER

The Court, having reviewed the Motion and the applicable law, having taken judicial notice of the docket and proceedings in this case, having heard the argument of counsel and being otherwise fully advised in the premises, hereby

ORDERS AND ADJUDGES that:

1. The Motion is GRANTED IN PART and DENIED IN PART.

2. The Motion to Dismiss is GRANTED IN PART and DENIED IN PART.

3. Gwynn's request pursuant to Rule 9011 for attorney's fees and costs incurred opposing the Motion for Sanctions in this Court is DENIED.

4. Rule 9011 does not authorize this Court to award appellate attorney's fees. Therefore Gwynn's request pursuant to Rule 9011 for attorney's fees incurred on appeal in District Court is DENIED WITHOUT PREJUDICE.

5. Gwynn's request for appellate costs pursuant to Rule 8014 is GRANTED. Appellate costs in the amount of $1,591.58 are taxed against Rotella, Rotella, P.A., and Debtor, jointly and severally.

Footnotes

[1] Notices of Appeal Nos. 818 and 911 were both transmitted to U.S. District Court for the Southern District of Florida on August 5, 2005. The District Court designated Notice of Appeal No. 818 as case no. 05-80714-Civ Gold assigned to the Honorable Alan S. Gold. Notice of Appeal No. 911 was designated as case no. 05-80715-Civ-Altonaga assigned to the Honorable Cecilia M. Altonaga. These two cases were consolidated before Judge Gold under lead case no. 05-80714-CIV-GOLD.

[2] Courts may look to authorities applying Fed. R. Civ. P. 11 standards when determining matters under Bankruptcy Rule 9011, because Fed. R. Civ. P. 11 and Bankruptcy Rule 9011 are substantially identical. See In-re Mroz, 65 F.3d 1567, 1572 (11th Cir. 1995).

[3] Having determined that an award of fees and costs to Gwynn is not warranted pursuant to Rule 9011(c)(1)(A), the Court need not reach the issue of whether Gwynn as a pro se litigant can incur attorney's fees. See Massengale v. Ray, 267 F. 3d 1298 (11th Cir. 2001)(determining award of attorney's fees as a sanction to an attorney representing himself violates the language of Rule 11 because a pro se litigant cannot "incur" attorney's fees).

[4] Despite the Court's repeated admonitions to Gwynn regarding her need to become familiar with, and adhere to, the Court's procedures and rules, at the November 2, 2006 hearing Gwynn failed to produce a proper Local Form "Exhibit Register" as required by Local Rule 9040-1(A). See November 2, 2006 Hearing Transcript at 6-7 [C.P.1834].

[5] At the November 2, 2006 hearing Mr. Gleason argued on behalf of Rotella that Gwynn's Motion was deficient because, among other things, it failed to indicate from whom she sought payment for fees and costs. The Court notes that both sides have engaged in sloppy lawyering. The Court was compelled to research what parties brought which pleadings since movants seem to change without rhyme or reason from pleading to pleading. The Court notes that while Rotella, Rotella P.A. and the Debtor brought the Motion to Shorten and the Motion for Sanctions, it was only Rotella and the Debtor who filed the Motion to Dismiss. Yet at the November 2, 2006 hearing, Mr. Gleason appeared on behalf of Rotella P.A. and Rotella appeared on behalf of the Debtor. The Court finds it appropriate to tax the allowable appellate costs against Rotella, Rotella P.A. and the Debtor, jointly and severally. These are the parties that filed the Motion for Sanctions and these parties opposed Gwynn's Motion. The Court does not find that they are in any way unfairly surprised that Gwynn seeks fees and costs against them.